This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

3 3433 07591146 5

TRIAL

OF

REV. JOHN B. MAHAN,

FOR FELONY,

IN THE MASON CIRCUIT COURT OF KENTUCKY,

Commencing on Tuesday, the 13th, and Terminating on Monday the 19th of November, 1838.

REPORTED BY JOSEPH B. REID AND HENRY R. REEDER, Esqs.

CINCINNATI:

SAMUEL A. ALLEY, PRINTER, CORNER OF MAIN & SIXTH.

1838.

Trial
SEK

TRIAL

OF

REV. JOHN B. MAHAN,

FOR FELONY.

IN THE MASON CIRCUIT COURT OF KENTUCKY.

Commencing on Tuesday, the 13th, and Terminating on Monday the 19th of November, 1838.

REPORTED BY JOSEPH B. REID AND HENRY R. REEDER, Esqs.

CINCINNATI:

SAMUEL A. ALLEY, PRINTER.

1838.

ENTERED according to Act of Congress, in the Clerk's Office of the District of Kentucky.

#5869
MYERS COLLECTION

CHARGE OF JUDGE REID,

To the Grand Jury of Mason county, Ky., November 12th, 1838.

GENTLEMEN OF THE GRAND JURY:

There is one other law to which I am impelled, by inclination, not less than duty, to call your attention. It is a law which was passed by our Legislature, long before the exciting fearful question of *abolition* agitated our hitherto peaceful land; long before the emancipation of our slaves was sought to be effected by means as unconstitutional, as they are dangerous to the safety of the owner and destructive to the happiness of the slave; a law which originated in a proper and jealous solicitude, upon the part of your representatives, for the security of your rights and interests in what now constitutes a large portion of the productive wealth of our state.

This law declares, "that if any person shall be guilty of seducing or enticing any slave, to leave his lawful owner or possessor, and to escape to parts without the limits of the state, or a foreign country; or shall make, or furnish, or aid, or assist in making or furnishing, a forged pass, of freedom, or any other forged paper, purporting to be a deed of emancipation or will, or other instrument liberating or purporting to liberate, any slave, or shall in any manner aid or assist such slave in making his escape from such owner or possessor to another state or foreign country, any person so offending shall, on conviction, be sentenced to confinement in the jail and penitentiary of this commonwealth a period not less than two or more than twenty years; and if any person shall be guilty of enticing any slave to abscond from the service of his or her owner, or possessor as aforesaid, or shall conceal any such runaway or absconding slave, knowing it to be such, within this state, every person so offending, in addition to compensation to such owner or possessor, shall be liable to an indictment, or presentment of a grand jury, and on conviction, be liable to pay a fine of not less than fifty nor more than six hundred dollars."

In charging you, gentlemen, as to the existence of this law, and inviting your attention to its penalties, I shall be pardoned for denying that the condition of our slaves is such as to require the kind offices of the modern abolitionists.—Have we, "muzzled the Ox that treadeth out the corn?"—Our slaves are better fed and clothed, than many of our white neighbors whose sympathies are enlisted in their favour. If the interest and duty if the master does not induce him to treat his slave humanely, the Legislature has ordered the Judge of the circuit court to direct such slave to be sold and the proceeds paid to the owner. Formerly, slaves were tried without the intervention of a grand or petit jury; but *now*, such is the humanity of our laws, as it regards all trials, involving their lives, that they are

placed upon a perfect equality with their masters, and it is made the duty of the Judges, when a slave is arraigned, if the masters neglected to employ counsel in his defence, to assign it for him, whose compensation is fixed by law; the right of peremptory challenge, and all those incidents connected with the more important right of trial by jury, are extended to slaves. They are capitally punished but for few offences, while for the commission of all others, stripes are inflicted, and for many of which the owner would be sent to the penitentiary for years. A proof that our Legislature has acted upon the principle that, where "much is given much is required."

I cannot believe that any country, however enlightened by christianity or philosophy, has done more to ameliorate the condition of its slaves than Kentucky. They are indeed happy, and if let alone would still remain so. Where "Ignorance is bliss, 'twere folly to be wise." The efforts of their pretended friends to educate them and emancipate them, among us in the present state of our laws and of public opinion, render their condition worse—they are rivetting the fetters which they feign believe are irksome and galling still stronger, and *freedom*, like the cup of Tantalus, though presented to the lip, is still withheld, and still further removed from fruition.

The relation of master and slave is so wrought up in our social and political existence, that it ought not to be tampered with by any and every political or religious empyric; the consequences of its sudden disruption, are alarming to the *real friends* of freedom, to the philanthropist in every clime. It is a sacred relationship; it existed among the Jews and Gentiles, long before the coming of the Messiah, yet it is among his professed disciples that we find many of those whose sympathies seem enlisted in favor of educating and emancipating slaves.

I am mistaken, if they are not pursuing a course contrary to that marked out by their Saviour, or his great Apostle to the Gentiles, all that *twattle* on the subject of equality, to the contrary notwithstanding.

"Would any of you, said Jesus Christ, who has a *servant* ploughing or feeding cattle, say to him on his return from the field, come, immediately, and place yourself at the table; and not rather make ready my supper; gird yourself and serve me, until I have eat and drink; and afterwards, you may eat and drink?" —Luke 27.

We are answered by those who are so zealous in the cause, it was a *servant* and not a slave—was it, I ask a *servant* that the Apostle Paul found belonging to Philemon—or a slave? I have been taught to believe it was Philemon's *slave;* and to show us by example what we ought to do—the Apostle taught him christianity and sent him home to his master.

Rest assured that those who think they are doing God service, by meddling with the slave question, and making it a test, are as mad in their career as was Saint Paul himself before he was better taught.

I do not mean that they are deficient in education, or Philanthropy. I know better; they may be like him, bred at the feet of Gamaliel, and "more wise, more learned, more every thing," on all other subjects; but on this one, may be permitted to say as he did, after he saw his error in his unholy errand, to bind and persecute christians, they are wholly ignorant.

I will add that, if his example is worthy of being followed by those who call themselves disciples, they should send home the runaway slaves they may find in their travels, to promote Christianity. But, instead of this course, we find every means that can be devised in direct hostility to the clearest principles of justice resorted to—societies formed to condole with, and lament over, the fancied hard fate, and unfortunate condition of slaves, printing and caricaturing, in many instances describing and depicting scenes which modesty forbids me to mention, in order to excite public indignation against slaveholders, calculated to drive slaves to insurrection, especially those taught to read and write; periodicals and address, sent by mail, containing intemperate language, and singularly unjust and false charges as to the treatment of slaves and of the moral consequences flowing from the existence of slavery. Politicians and Divines, circulating incentives to servile war, and slave-holders excluded from the Communion Table of our Saviour.

A distinguished disorganizer, I will not dignify him by soiling this paper with his name, as if determined to outstrip all his cotemporaries in abuse and detraction, has recently said, in a letter published in our newspapers, "that no American slave-holder ought to be received on a footing of equality by any of the civilized inhabitants of Europe." An anathema that will not be adopted and cherished by many, even among the abolitionism in this land,—seeing the foul source from which it comes. These and a thousand other wrongs we feel, and have received at the hands of some of our brethren here in favor of abolition. I call them brethren. We are all of one family, bound together by common origin, having the same interest in the glorious inheritance transmitted us by our fathers, who, having achieved our independence, formed that constitution in which our right to hold slaves is recognized and confirmed.

Gentlemen, although our jurisdiction is limited by the bounds of Mason county, yet in consequence of our being divided from our brethren of Ohio by a river only, it becomes necessary frequently to speak of fundamental principles in order to keep them in memory, "lest at any time we should let them slip."

Many of the first men in the world may review this day's proceeding. We wish them to know that "we appeal to the natural justice and magnanimity of our brethren, and conjure them by the ties of our common kindred, to disavow their usurpations," and suffer us to enjoy our property in peace, as secured to us by the constitution, an instrument which time has taught us to reverence, no less than language, now speaking as it were from the grave, of him who was "first in war, first in peace, and first in the hearts of his countrymen." Hear it:

"The unity of Government which constitutes you one people, is also now dear to you. It is justly so, for it is a main pillar in the edifice of your independence, the support of your tranquility at home, your peace abroad; of your safety, of your prosperity, of that very liberty which you so highly prize. But, as it is easy to foresee that from different causes, and from different quarters, much pains will be taken, many artifices employed, to weaken in your minds the conviction of this truth; and as this is the point in your political fortress, against which the batteries of internal and external enemies will most constantly and actively, (though often covertly and insidiously) be directed, it is of infinite moment that you should pro-

perly estimate the immense value of your national Union to your collective and individual happiness; that you should cherish habitual, cordial and immovable attachment to it; accustoming yourselves to think and speak of it as the palladium of your political safety and prosperity, watching for its preservation with jealous anxiety, discountenancing whatever may suggest even a suspicion, that it can in any event, be abandoned. For this, you have every inducement of sympathy and interest, citizens by birth or choice of a common country, that country has a right to concentrate your affections.

"The name of American which belongs to you in your national capacity, must always exalt the just pride of patriotism, more than any appellation derived from local discriminations: with slight shades of difference, you have the same religious manners, habits and political principles.—You have in a common cause, fought and triumphed together. The independence and liberty you possess, are the work of joint councils and joint efforts, of common dangers, sufferings and successes."

This is the language of the farewell address which the great and good WASHINGTON left at his last benediction to his country. And remember, WASHINGTON was a slaveholder.

I repeat that your duties in the presentation of crime, extend only to the county of Mason. You must state the place where the crime was committed, to enable the accused to make defence understandingly; it is essential, and without designation of the place where the crime was committed, the indictment would be bad at common law, much more under our constitution, which secures the accused a right of trial in the county where he is charged to have committed the offence, and by a jury of the vicinage. Do not, therefore, suffer yourselves, by an honest enthusiasm for the public safety, or because of the alarming magnitude of the offence, to be deluded into a belief that this court can take jurisdiction of any crime committed out of the State.

"Heaven and earth may pass away, sooner than one jot or tittle of the *law* shall be violated." And if you should inadvertantly present, for crime committed out of the county of Mason, the humblest citizen shall have the law, when the evidence comes to be heard in court. At the same time, however, it will be my honest pride to protect the interest of the community by a rigid exposition of the application of the *law, as it is,* to all offences against the peace and dignity of this commonwealth, within our jurisdiction. I will say like Lord Coke, upon a memorable occasion, "that I dare do every thing that it would befit a Judge to do."

When military power, and usurpation, caused Bollman and Swartwout, to be seized in New Orleans, and sent to Washington City, to be tried for treason, they were discharged by the Supreme court of the United States, "it being the unanimous opinion of the court that they could not be tried there." "But for offences committed on the high seas, or in any river, haven, bason, or bay, not with in the jurisdiction of any particular state, there is no court which has particular cognizance of the crime, and therefore the place in which the criminal shall be apprehended, or if he be apprehended where no court has jurisdiction, that to which he is first brought, is substituted for the place in which the offence was com-

mitted." But, a court in New Orleans, had been established by law, and there they had a right to be tried.

Aaron Burr was also put upon trial in Virginia, for treason; but it appeared in evidence, that if guilty at all, he had not committed the crime in that State, and and the consequence you know, he was also acquitted and sent to the State of Ohio, where it was charged he had committed offence. Party displayed itself every where, during this interesting period, except in court. It was solemnly asked, as with authority: "Whether the defect was in the testimony, in the law, or in the administration of the law." Yet, the Chief Justice, (I have a right to speak of the illustrious dead,) bore the contumely and reproach of newspapers, and stump orators, some of whose effusions to our shame, found their way into school books, until the people became more enlightened, lived to receive the honor, I might almost add, the homage of both parties. And even now, we feel proud that he lived to give a construction to the constitution he helped to make, which will prevent one party—when greatly excited—from sacrificing the other, for words without acts. He teaches us too, if our constitution had not taught it before, that the accused has a right to be tried at the place where he committed the offence, and by a jury of the *vicinage*.

A southern gentleman could not be removed from his own State, to another he never was in before, and tried for *Nullification*—nor a gentleman, taken from any of the States, and tried for being of the Hartford Convention.

It was one of the complaints made against the British King, in the Declaration of Independence, "For transporting our citizens beyond the sea, to be tried for pretended offences." And, so far as the law on the subject of treason, may apply to any case which may come before you; I hope you will bear it in mind, and not wrong yourselves or your brethren of another State, by attempting that which the Constitution forbids.

And laying the foundation for your Governor to demand of the Governor of a sister state any one who has not *fled* from justice. Your respectability is such, that if you present a person in another State, as having committed a crime here, the Governor, upon a proper case made out, might feel it his duty to demand the fugitive; having sworn to support the Constitution, and see the laws faithfully executed.—And the Governor of a sister State, having taken the like oath, would be unworthy the trust reposed in him, if he failed to surrender such fugitive from justice, and keep that harmony, and good faith, of which the Father of his country speaks in his Farewell Address, from which I have extracted so largely.

But, if you, without evidence that the crime was committed here, present persons in another State, who gave it aid or countenance, by speeches writings, resolutions or carricatures—you do yourselves great injustice, and produce a state of feeling adverse to our mutual peace and safety, and to the sovereignty of States, not less than the personal security of the citizens.

They no doubt entertain the opinion they profess, and we as honestly differ with them. "Error of opinion must be tolerated, while reason is left free to combat it." When they talk about the truths which they maintain as self-evident—"That all men are born equally free, &c." we must point to the practice of our fathers ever since the adoption of the Constitution, to prove that slaves were not

included in that expression: And until they act, within our Jurisdiction, no words, however severe against slaveholders—or encouraging general abolition—can authorize you to present them, unless it be to point the finger of condemnation to a subject that needs reform, and then it would die as presentments made against measures, absurd in themselves, or men, unworthy the honors they hear.

I have given you the law gentlemen, and no matter how slavery may be deprecated or defended, obedience to the laws is among the cardinal virtues, especially in a government like ours, where the singular spectacle is exhibited, of the governed being also the governors. Here each citizen participates in the legislation of the country, and is bound to support the yoke which he himself has been instrumental in placing on his own neck. Here a violation of the Rights of the humblest man in the land, though only here on a visit from a sister state, is justly considered an injury to the whole, and the safety of the whole cannot be better consulted than by a strict and rigid protection of the rights of each. Whenever people forget, or disregard the law, and wrest from the constituted authorities their administration and condemn even the unworthy and guilty without the ceremonies and forms of law, liberty is in danger.

Vengeance is a feeling in which society, as now organized, in reference to the punishment of offences, does not indulge. 'Tis only when thrown back into its chaotic and impulsive elements, such as the unrestrained mob exhibits, that vengeance is known.

"The law is to the sword, what the handle is to the hatchet. It directs the stroke, and tempers the force."

For the sake then of "our own dear Kentucky," while you recollect your oath in court, recollect your honor out of court, and preserve her escutcheon by a manly and dignified contempt of every thing like violence. "Take the laws as they are, they are the only barriers, between you and the robber's violence, and the assassin's knife, and I would say, revere them, thwart them not—stand by their decision, come to their help all good men and true."

"Let them not be brought into mistrust by objections, and commutations, 'till they have no mastery left. Let them not be undermined by the wasteful washy tide of mistaken philanthropy or revenge.

"In the name of the Divine equity, for the sake of the common protection, stay them not to their righteous, though terrible doings. Every attempt to invalidate their spoken decree is a public wrong: every voice that has sworn to Judge only according to law, and evidence, and then refuses to speak but according to party, is false to his oath."

Your oath is to present no person through malice, or ill will, or leave any unpresented through fear, favor, or affection, or for any reward, hope, or promise thereof. But in all your presentments, to present the truth, the whole truth, and nothing but the truth, according to the best of your skill and judgment.

PROCEEDINGS OF COURT.

On Tuesday the 13th day of November, 1838, being the second day of the November Term of the Mason Circuit Court, the case of the Commonwealth of Kentucky against John B. Mahan, for the abduction of a negro, the property of William Greathouse from the State of Kentucky, was called for trial, being present the Hon. WALKER REID, Judge, and THOMAS Y. PAYNE, attorney, and JOHN A. MCCLUNG, JOHN D. TAYLOR and HENRY WALLER, assisting attorneys for the Commonwealth; the Hon. JOHN CHAMBERS, J. C. VAUGHAN, BEARD, and FRANCIS T. CHAMBERS, Attorneys for the Defendant.

The Court demanded of the attorney for the Commonwealth if he was ready to proceed with the trial. The attorney for the commonwealth answered that he was not then ready; he had sent on yesterday evening a messenger to Ohio for two witnesses that had promised to attend on the trial, but who had not yet arrived, and that he expected them every hour, and must therefore ask for a postponement of the trial.

Mr. Chambers objected to a postponement, because it would be oppressive to the prisoner, and because it did not appear that the absent witnesses could prove, if present, any facts material in the prosecution.

The Court said, he understood the remarks of Mr. Payne as rather addressed to the Counsel for the prisoner than to the Court, but as the gentlemen could not agree, he would overrule a postponement.

Mr. Payne then asked leave to file an affidavit, which was granted him.

The Counsel for the prisoner demanded that he should be brought into court, which was ordered to be done; and the prisoner appearing in court, was arraigned and plead "*not guilty*" to the indictment, and it was answered for him by Mr. Chambers, that he would be tried "by the Court and jury."

Mr. Payne then read to the Court the affidavit of himself and

William Greathouse, and thereupon moved the Court for a continuance. The affidavits are as follows, to wit:

COMMONWEALTH OF KENTUCKY,
vs.
JOHN B. MAHAN, } *Upon an Indictment.*

The affidavit of William Greathouse. He states that Samuel Masters, a citizen of Brown county, Ohio, he thinks is a material witness in the case of the Commonwealth against John B. Mahan. He thinks the said Masters will prove that he saw the boy John in the house of Mahan, and conversing with Mahan, shortly after the boy was missing from the farm of this deponent: That in the conversation, when Mahan and the negro John was conversing together, it was expressly told to Mahan, by the boy John, that he was the slave of William Greathouse, who resided near Washington, in the state of Kentucky: and Mahan in the same conversation, and at the same time, assured the boy John, that he would so fix matters for him, John, that he should not be caught; that none of them were ever taken after they reached his house. Affiant states that the witness Masters, promised to be at the court yesterday, which promise was made during the last week. Masters was not present yesterday at court, and the reason why, this affiant could only state upon report. On yesterday, a messenger was started to the house of Masters, to bring him. This messenger was one of his neighbors, who said he believed he could bring him, and was expected to be back to day at 2 o'clock, and we are now hourly expecting his arrival. Masters lives about 35 miles from this place. This affiant does verily believe that the said Masters' attendance can be procured, and at this time, if he is not sick; and whether he is sick or not, can be ascertained upon return of the messenger, who will be back in a few hours. And if Masters is too unwell now, his attendance can be procured at the next term of the court. Affiant also believes that he can prove by said Masters, that the accompanying letter, which is now made part of this affidavit, is in the hand writing of the prisoner Mahan:

MAHAN'S LETTER.

Sardinia, August 4th, 1838.

DEAR SIR:

You will take care of the oppressed for the Lord's sake. Send her to Mr. ——— Johnson's, brother of the Rev. Hezekiah Johnson, ten miles north of Hillsborough, or to Thomas Hibbens, at Wilmington. The Lord bless you.

Two o'clock in the morning, by moonshine in the street. Yours,

JOHN B. MAHAN.

This affiant can also prove, he believes, about the same facts, by Mr. ——— Hamilton, who is also in Ohio, and a neighbor of the prisoner Mahan, and also a close neighbor of the other witness Masters; and that the attendance of Hamilton can also be procured, and will be here with the messenger, who is now gone for them.

Thomas Y. Payne, Attorney for the Commonwealth, states, that from the foregoing affidavit of William Greathouse, he does verily believe the evidence of the two witnesses therein referred to, would be material in the trial of this cause:

and from said affidavit he believes the said evidence can be procured; and that it would be unsafe for the Commonwealth to go to trial, until the said witnesses can be procured, or till a reasonable time is given the Commonwealth to procure he attendance of the said witnesses.

William Greathouse and Thomas Y. Payne appeared before me, and made oath that the facts stated in the affidavit above, they believe to be true. Given under my hand, this 13th Nov., 1838.

W. J. BULLOCK, *J. P.*

Mr. Chambers said he could prove by a respectable gentleman then in court, that Mr. Masters, the witness absent, said on yesterday he knew nothing that could benefit the commonwealth, and that he was not coming. Mr. C. said, because of the odium attached to the offence with which the prisoner was charged, not because of his poverty, he could not obtain bail in Kentucky; that he had already been a long time incarcerated, and in irons; that the witnesses were out of the reach of the process of the Court, it was uncertain whether they would come at all, and moreover their evidence would be entirely irrelevant, and would not conduce to prove an offence committed in the State of Kentucky; and he thought, therefore, the trial should proceed. He deemed it not necessary to discuss the relevancy of the matters set forth in the affidavits, and asked leave to file an affidavit as to the declarations of the absent witnesses for the commonwealth. Which was granted to him.

Mr. Payne said he only wanted a postponement for two hours, that the messenger might have time to return. Mr. Chambers remarked that he might have until to-morrow morning, if he would not then insist upon a continuance. Mr. Payne said he could not agree to such a postponement, for he might then be able to prove that the witness had been detained by the prisoner's friends, or he might then be able to show some other ground for a continuance. He wanted a reasonable time, until the messenger returned, and if the witnesses did not come, but remained of their own free will, he would not then insist upon a continuance. He did not wish a continuance until the next term. He must have time to prepare for the commonwealth, and the Court should wait a few hours; it cannot oppress the prisoner; if it could, he would not ask it. He said it was not the practice to discuss the relevancy of an affidavit, but was ready *to meet it.*

The Court said, it is now late, and the trial shall be postponed.

Mr. Chambers. The prisoner is willing to go back to jail, if he

can get a trial in a reasonable time, and he now urges a trial on the ground of the affidavit which he will offer.

The Court. I now have my eye upon an English decision that will decide this matter, but I will not now decide it, and will adjourn until to-morrow morning, and will then decide the motion. In the meantime Mr. Chambers may prepare his affidavit. And the Court adjourned to meet to-morrow morning at 9 o'clock.

Wednesday morning, 14th November 1838, the Court met.

The Attorney for the Commonwealth informed the Court that all reasonable expectation of being able to obtain the attendance of Messrs. Masters and Hamilton of Ohio, had vanished, and he was ready to proceed with the trial.

After ten peremptory challenges, a jury was sworn, to wit:

David Henderson, James Brodrick, Samuel Carr, George W. Prater, Thomas Parry, Samuel Clark, Samuel Watson, Joseph Howe, Hensley Cliff, Spencer R. Howe, Thomas La Rue, Reason Downing.

The Court again gave to the prisoner the privilege of excepting to the jury, and the counsel for the prisoner answered that they were satisfied.

The Clerk then read to the prisoner the Indictment, which is as follows, to wit:

INDICTMENT.

The Commonwealth of Kentucky, sct.

The Grand Jury empannelled and sworn for the body of the Mason circuit, at a court begun and held for the county of Mason, on the thirteenth day of August, in the year of our Lord one thousand eight hundred and thirty-eight, at the court house of Mason county, in the town of Washington. In the name and by the authority of the Commonwealth, upon their oath present, That John B. Mahan, late of the county of Mason, gentleman, on the nineteenth day of June, in the year of our Lord one thousand eight hundred and thirty-eight, at the county of Mason aforesaid, did aid and assist a certain slave named John, the property of William Greathouse, then and there in the said county of Mason being, to make his escape from the possession of the said William Greathouse, and to escape to the state of Ohio, and out of and beyond the state of Kentucky, he the said John B. Mahan not having lawful or color of claim to the said slave John, the property of the said William Greathouse as aforesaid, contrary to the statute in that case made and provided, and against the peace and dignity of the commonwealth of Kentucky.

THOS. Y. PAYNE,
Attorney for the Commonwealth.

The Capias adrespondendum which issued on the foregoing Indictment is as follows, to wit:

The Commonwealth of Kentucky, To the Sheriff of Mason County, greeting: We command you to take John B. Mahan if he may be found within your bailwick and him safely keep, so that you have his body before the Judge of our Mason Circuit court, at the court-house thereof, in the town of Washington, on the first day of the next November term, to answer, "the Commonwealth of Kentucky," of an Indictment of the Grand Jury found at the last August term, 1838, of Mason Circuit Court for aiding and assisting a certain slave named John, the property of one Willam Greathouse, then and there in the said county of Mason being, to make his escape from the possession of the said William Greathouse, and to escape to the State of Ohio, and out of and beyond the State of Kentucky, contrary to the statute in such case made, and provided, and against the peace and dignity of the Commonwealth of Kentucky, and have then and there this writ: Witness Marshall Key, Clerk of our said court at the Court house aforesaid, the 18th day of September, 1838 and in the 47th year of the Commonwealth.

MARSHALL KEY.

Upon the foregoing Capias are the following endorsements returned, to wit:

Came to hand 18th September, 1838, and executed same day on John B. Mahan.

DAVID WOOD, *Dy. for*
A. FOX, *S. M. C.*

A copy, Attest: MARSHALL KEY, *Clerk.*

James R. Perrigo and William Greathouse were called and sworn as witnesses for the Commonwealth.

W. Greathouse examined.—Question by the attorney for the commonwealth. Did you own a negro man named John? state to the jury whether he left you on the 19th of June last

Answer. I had a negro man by that name, who left me upon the night of the 19th of June last, about five feet ten inches high, about 38 or 40 years of age, of a dark color.

Q. by same. Did you pursue him to Ohio, and did you meet the prisoner? Tell what occurred.

Answer. I pursued him the night after he left me, went to Ohio, reached Georgetown on Thursday after he left; was led to the belief that he was at Mahan's house.

Q. by same. Did you hear a conversation between Mahan and Perrigo the night this letter was written? (*handing it to him.*)

Answer. On the night of the 14th of August, I was in hearing of Mahan and Perrigo, the same night this letter was written; this is the same letter Perrigo handed me. Perrigo had with him a negro woman, who Perrigo said to Mahan, was John's wife. Mahan came out with a rifle on his shoulder, and told Perrigo he must go

to John Hudson's. Perrigo refused. Mahan insisted, and talked loud, (Perrigo being deaf.)

Mr. Payne,—Tell all from the beginning.

Mr. Mahan told Perrigo if he would go on to ———, she would find her husband. He gave money and a letter to Perrigo. Perrigo went on with the woman, and he followed them. He saw Mahan writing in the street.

Q. by Chambers. Did Mahan write in the street?

Ans. Yes he did by moonshine, at 2'clock at night.

By same. Did Mahan believe this woman was John's wife?

Ans. Yes, he did.

By same. How came he to that belief?

Ans. I don't know of my own knowledge.

By same. Did Perrigo tell him so?

Ans. Mahan asked if she was the wife of John, and Perrigo said yes.

By same. Was she really his wife?

Ans. No.

By same. Is she free, and what is her color?

Ans. She is free and about half blood.

By same. By whose procurement did she go?

Ans. By Perrigo.

By same. Did she go by your request?

Ans. I also requested her. She went with Perrigo, and I followed about one hour behind.

By same. Is she the wife of Mr. Woods Orange?

Ans. She is said to be.

By same. At whose instigation did Perrigo go?

Answer. It was first proposed by himself, after I heard from Ohio.

By same. Had you been before at Mahan's house?

Ans. I had.

By same. Did you tell him your name?

Ans. No, not that I recollect; I think he did not enquire. I told him I was from the Northern part of Ohio, buying cattle. Had he enquired my name, I would not have told him.

By same. Where were you when Perrigo last conversed with him?

Ans. I was concealed near them. Kile, of this county, and one of my black men held our horses.

By same. Did they hear the conversation?

Ans. No.

Q. by attorney for Commonwealth. Did you not conceal yourself when Mahan came out of the house with the rifle, to hear their conversation about your slaves?

Ans. Yes; I thought he would take the woman to John, and I would then ascertain where he was.

Q. by Chambers. Do you say the woman is free?

Ans. Yes.

By same. Did you pay her for going?

Ans. Yes.

By same. Did any one else pay her?

Ans. No.

By same. How long have you known Perrigo?

Ans. About 12 months.

By same. Is he a stranger in the neighborhood?

Ans. Yes, Sir, he was.

By same. Is he your tenant?

Ans. Yes, for a short time until he gets possession of his land in an adjoining county.

Q. by attorney for Commonwealth. Did Perrigo go at your request to Mahan's?

Ans. Yes, Sir. When he heard they were at Mahan's, he said he thought he could get them by going.

Q. by Chambers. Did he go voluntarily?

Ans. We consulted and advised together, and he offered his services.

By same. Did you pay him for going?

Ans. Only so far as to pay his expenses. I had offered any man $400 to get my negroes, and he said he would not go for the money, but would go if his expenses were paid.

Perrigo was then called.—Said he went to Mahan and told him he lived near the River on the Ohio side; told Mahan a negro woman came to his house and said she was the wife of a negro man named John, and asked Mahan if he had seen such a negro. Mahan told him that he had seen two negroes by that name, one belonging to a Mr. Greathouse near Washington, Kentucky; that Greathouse had two negroes run off, and that he had come near catching one of them. He asked Mahan if the woman could get to her husband, and he said she could if he would bring her to him. He went with the woman, on the Tuesday following that Wednesday,

at night, and called Mahan out and asked him for the woman's husband, and Mahan said he did not know where he was, but expected he was near Canada. Mahan insisted that he should go on to *the next friend*, and after some conversation he agreed to go. I told Mahan I would like to have a letter of introduction, and he said he would give it to me, and he brought out some paper and wrote a letter in the street by moonlight, directed to Colonel Keys and Mr. Hibbens of Hillsborough.

Q. By att. for Commonwealth. Is this the same letter (handing it to the witness) that he gave you, and that you handed to William Greathouse.

Ans. Yes, Sir. Mahan then asked me, if any more came to my house to send them to him. He said there was a colored man in Maysville who sent him all he could, and that he had helped along fifteen within a short time past.

By same. Did he say that Greathouse's negro had been there?

Ans. I understood him so.

By same. Did he say he would pay you for sending him negroes?

Ans. He did.

By same. Did he pay you for bringing the woman?

Ans. He paid me three dollars.

Payne. Relate all the conversation that happened the first time you went to Mahan's.

Witness. I told Mahan a woman came to my house asking for her husband; she said his name was John, and he wanted to get some information of him, and Mahan said there had been two negroes at his house named John, and one of them belonged to William Greathouse near Washington, Kentucky, and if he would bring the woman to him that week he would help her to get to her husband.

By same. Was it then he wished to employ you?

Ans. He said if it was any inducement, he would pay me if I would send him all that came to my house; that a colored man in Maysville, a barber, sent him all he could.

Q. by Chambers. Was this during the first interview?

Ans. Yes, Sir.

Payne. Tell what he said about the connecting chain of *friends*, from Kentucky, running all the way to Canada, of which he himself formed a part?

Mr. Chambers. I object to the question as being calculated to incense the public mind unnecessarily, without having an effect to throw light upon the indictment.

Payne. This will open the question as to the whole fact, whether the prisoner can be convicted through agency.

Chambers. The attorney for the Commonwealth had better withdraw the question and press at the conclusion, when the general question will be made. He was willing to open the debate and rest the whole upon this question, if the attorney for the Commonwealth pressed it, but he hoped he would not check the examination now.

[The Court said he would be glad if the attorney for the Commonwealth would agree to the course Mr. Chambers proposed, but would not compel him.]

Mr. Payne said, he could not surrender the witness; it would be too great a draw upon his liberality.

[The Court. If the Commonwealth persists, the *defence has the right to open and conclude.*]

Wednesday evening. Mr. Chambers, upon consultation with the prisoner, yielded, and permitted the question to be asked; and gave notice that he would move the Court to exclude it at the proper time.

Mr. Payne. What did Mr. Mahan say about the connecting chain of which he himself was a part, extending from Kentucky all the way to Canada?

Ans. Mr. Mahan asked me if the negro had any money, and I told him not that I know of. Mahan then said there was a connection of friends who paid the passage of the negroes to Canada.

Q. by same. How much were you paid for bringing the woman supposed by Mahan to be John's wife?

Ans. Three dollars.

Q. by Chambers. When did you first go to Ohio?

Ans. On Sunday previous to the date of the letter.

By same. What did you say about your residence?

Ans. I told him I lived on the Ohio side of the river. I told him that my name was Rock.

By same. Is that your real name?

Ans. Yes sir, James Rock Perrigo.

By same. Who employed the woman to go with you Mr. Rock?

Ans. Mr. Greathouse I expect. I had no hand in it particularly —had no hand in employing her.

By same. Under what name did she go?

Ans. Did not call her by any name when over there, but took her as the wife of John; that she was a runaway, and had come to my house; I told him *that* also on my first visit.

By same. What did you do with the three dollars?

Ans. I kept it.

By same. Did you consider you had a right to it?

Ans. I didn't know.

By same. Where did you leave Greathouse when you went to talk with Mahan?

Ans. I left him with the horses.

By same. Did you expect him to follow you?

Ans. I did.

By same. Were you a tenant of Greathouse?

Ans. Not then, but I am now.

By same. For how long?

Ans: For three years. We cultivate the farm on the shares. I get one half of all I raise.

By same. Where did you reside before coming to Kentucky?

Ans. In Pennsylvania. Was raised in Washington county, New York.

By same. Did you ever live in Ohio?

Yes sir, in Columbiana county.

By same. What was your calling in Pennsylvania?

Ans. Farming and other business.

By same. Are you the same Mr. Perrigo who had race-horses a few years ago in Newport?

Ans. Yes. I had one race horse in Newport.

By same. Were you ever in Mississippi?

Ans. No.

By same. Were you ever in Georgetown?

Ans. Yes sir.

By same. Were you ever in Lexington?

Ans. Yes sir.

By same. Where did you then live?

Ans. In Pennsylvania.

Q. by Attorney for Commonwealth. Did you raise this race horse?

Ans. Yes sir.

By same. Did you take pride in his blood?

Ans. I did so sir.

By same. Did you think him a fine horse?

Ans. Yes sir, and I do yet.

[At this point in the examination one of the jurors fainted, and Perrigo left the house for a short time. While out he had a conversation with Mr. Greathouse.—Ed.]

By same. Is there any arrangement to live with Mr. Greathouse longer than this winter?

Ans. No sir; but there is a verbal agreement to live there longer.

Q. by Mr. Chambers. Since you left the court-house a moment since, have you had any conversation with any person about your contract with Greathouse?

Ans. Yes sir, with Mr. Greathouse.

By same. What is the contract between you and Greathouse?

Ans. A written agreement for the winter, and a verbal contract for three years.

Mr. Greathouse recalled.

Q. Mr. Payne. Explain the circumstances of the contract.

Ans. There is a written agreement for the winter, and a longer time spoken of. We spoke of breeding cattle, and making cheese, but having bought another farm, I have concluded not to keep him any longer. He considers it an agreement: *I do not.*

David Bronnough, Esq., was then sworn.

Q. by Payne. Is this letter the hand writing of Mahan.

Ans. It is my impression that it is.

Q. by Mr. Chambers. Did you ever see him write?

Ans. No, I judge from comparison, having seen and read a good many letters written by Mahan, since he has been in jail, and which were handed me by the jailor to read.

John Hill, jailor, sworn.

Q. by Payne. Is this letter Mr. Mahan's handwriting, and have you seen Mahan write?

Ans. I could not swear positively, but it is my impression that it is, having seen him write 20 or 30 letters since he has been in jail.

Q. by Payne. Would you swear positively to your own hand writing?

Ans. No sir, not always.

Q. by Chambers. Did you read his letters?

Ans. Yes sir. I read all he received and wrote, in his presence, and at his request.

Mr. Chambers objected to the testimony of Mr. Bronaugh, and Mr. Payne withdrew it, as being immaterial.

Mr. Payne then offered to read to the Jury the letter of Mahan to Keys and Hibbens, to which Mr. Chambers objected, as he said for the sake of *principle*, for he considered the letter already before the court and Jury.

Mr. Taylor. Mr. Chambers has said he wished to fathom the character of Perrigo, and had questioned him as to his character, calling &c., with an evident intention to invalidate his testimony. We ask to read this letter for the purpose of supporting the testimony of Perrigo, and hence it is legal evidence.

1st. It is relevant because it tends to corroborate the details given by Perrigo of his conversations with Mahan. Second, because it strength ens and gives point to the confessions of Mahan. And third, because it is necessary to prove that Mahan was one link in the chain of *friends* extending from Kentucky to Canada, and for this reason, if for none other, it is strictly legitimate that the jury may infer his participation in the crime.

Mr. McClung said, the letter was legal testimony because Mr. Chambers had admitted the testimony of Perrigo, and having sought to discredit it, he could not now object to that which would serve to strengthen it. Perrigo stated that Mahan gave him a letter; they could have called for it, and we would have been bound to have produced it or accounted for its absence.

Mr. Payne said he wished to produce the letter to corroborate two important points in the testimony of Perrigo. One was, that he had stated Mahan wrote it by moon light, and the other, that he went there with a negro woman, the supposed wife of John, both of which facts it tends to establish.

Mr. Chambers said, that the letter was an independent fact, and could not be read to sustain a witness impeached by his own evidence. He thought that it was intended for a mere *make-weight*, and did not go to prove that the prisoner was guilty of a violation of the laws of Kentucky. He thought that the attornies for the Commonwealth were more rigorous than the *welfare* of the Commonwealth demanded. The letter was interwoven in an affidavit, when nothing could be more *far-fetched*, and he could see no other motive than to prejudice the minds of the by-standers who were to compose the jury.

The court permitted the letter to be read, and cited a parallel in which a man, having entered into a recognizance, wrote a letter acknowledging the fighting of a duel on the other side of the Ohio Ri-

ver. A witness was introduced to prove the fact, and his testimony being impeached, this court permitted the letter to be read in its support.)

Here Mahan's letter was read to the jury, as published in Messrs. Payne and Greathouse's affidavit.

The Commonwealth having here concluded its evidence, Mr. Chambers moved the court as follows:

COMMONWEALTH,
vs.
J. B. MAHAN,

The evidence on the part of the prosecution being closed, the counsel for the prisoner moved the court to exclude the whole of it from the consideration of the jury as wholly in sufficient, and incompetent to prove the offence charged in the Indictment. Or that the court will instruct the jury that in the absence of all evidence to prove that the offence charged was committed by the prisoner being personally present in the county of Mason, at the time the offence was committed, he is not legally subject to conviction in this prosecution, and that the court further instruct the jury that this court and jury have no jurisdiction of this case if from the evidence they are satisfied the prisoner is a citizen of the state of Ohio, and had not been in the state of Kentucky until brought here by legal process to answer to this prosecution—unless he was personally present and aided the slave to escape from his master here or near enough to receive personal information, and give aid and assistance in case of alarm or danger.

PLEADINGS OF COUNSEL.

J. C. VAUGHAN'S SPEECH.

May it please your Honor.—I find myself in this crowded court-house an entire stranger. But I am no stranger to the character of this State. I am Southern born, and I understand the institutions, and know well the people of the South. I shall speak on this occasion then, as if I stood upon my own native soil, and among familiar friends.

I have no faith under any circumstances in a neutral, or timid, or wavering course. No cause can be advanced by it; and he who pursues this course is unfit to defend any cause. The true and only way is, on all occasions, to utter what we think, and to act out our thoughts, in the spirit of true manhood. This, I am sure, is the feeling here. I shall then, in what I may say, be direct; I shall mince nothing, conceal nothing which touches this case, or bears upon the deeper interests involved in it.

I say deeper interests; and I would emphasize the words. They are deep—

they concern the common weal, and start up questions vital to its welfare. Nothing then, selfish or sectional, nothing narrow or illiberal, no passion, no excitement should now be felt or fostered. The occasion is solemn; it calls for deliberation and self-restraint. Let the conduct of all therefore, in every respect be worthy of it, and make us as an order-loving and a law-obeying people.

Respect for Kentucky demands this from all her citizens. For who is before them, and on his trial? The stranger;—one who lives among another people, and under other laws; one too, who has been delivered up to them only from the sternest convictions of duty. Admit, as is contended, that he has disturbed the quiet and endangered the property of Kentucky; the appeal to her citizens to obey and sustain the law is, on this very account, stronger and higher. For if this be so, if under these circumstances Mahan is acquitted and allowed to go unharmed and untouched; theirs will be the proud boast, not only that they knew the right, but possessed the virtue to maintain it.

Respect, too, for Ohio demands this conduct. There is excitement here: your Honor sees it—I see it. But there is excitement also in Ohio, and her eye is upon this people, and her ear awaits with impatient anxiety the result of this day's trial. I refer now to no party; I speak of the friends of Kentucky; of the friends of the law; of the friends of this Union. All—all of us are full of anxiety. And why? Not because we sympathize with crime; not because one of our citizens is imprisoned; but because we believe that citizen cannot be convicted here and now, without violating the law and the Constitution. Ohio has done her duty; Mahan was delivered up by her in obedience to the law. Respect for Ohio then, demands that the law and the law only shall govern, and if the people of Kentucky are true to themselves and to her, they will sustain the law with chivalric promptness.

But why urge these considerations? This Court feels them, and will do its duty. But this jury, who are now about to try a man for an offence hated by them—do they realize their force? They do, and I rejoice to know it. I rejoice to believe too, that the people around us realize the force of these considerations: it is a good omen; it argues well for law and for liberty. Judges are on their guard, are cool, are wise, and rarely allow passion or prejudice to control their course or direct their decisions. But it is not so with the people. They feel strongly, and act rashly, whenever their property is endangered, or their rights invaded, and it is natural that they should thus feel and act. An exception to this rule, (and a noble exception it is,) we now behold. I do rejoice then, in the spirit which is now manifested, and though there is a strong excitement among this people, yet their sympathy I am sure is in full unison with the wish of the Court; that in all matters touching this trial, and the prisoner at the bar, right, law, and not passion or violence, shall prevail.

I approach the case then without anxiety, and shall proceed to comment upon the law as it is, and as it is conceived to be, with fullness and freedom. The indictment will inform us of the cause and nature of the accusation; I desire therefore, that it may now be read.

[Here the Indictment was read.]

The indictment is specific, as it ought to be, in its charges. It alleges;—

1. That John B. Mahan was in the county of Mason on the 19th of June.

2. That at that time and place he did aid and assist a certain slave named John, the property of one William Greathouse, to make his escape out of and beyond the State of Kentucky.

Now I supposed that it would be necessary to prove these charges to the very letter, and concluded if this could not be done, that the case would be abandoned; I am mistaken. The Commonwealth's attorney thinks otherwise; nay more, he and the gentlemen associated with him admit, that John B. Mahan was not in Kentucky at the time alleged in the indictment; nor before nor after it; and consequently, that he did not aid and assist the slave out of this State: and contend that if he aided and assisted that slave in Ohio, he has violated the Kentucky law, and must be convicted.

Well, be it so. For the sake of argument let us admit the gentleman to be right. Is Mahan guilty, then? Give the evidence its fullest force; stretch it as wide as may be; and is it strong enough to convict him? It discloses many things which I could have wished had been otherwise. But there is nothing in it which proves that Mahan any where aided John in escaping from his master. What is the evidence? It is the confession of the prisoner; a species of proof which experience teaches us to receive with caution, and which the courts of Kentucky in the most marked manner have discountenanced. And to whom was it made? To a deaf man; to one who could not hear the questions put to him unless uttered in the loudest voice. And what after all does this confession amount to? Why that Mahan was in the habit of aiding the escape of slaves; that means were provided him for this end; that he wished the witness to join him; that he had an agent in Maysville, that fifteen negroes had been sent to him, and that he believed Greathouse's John to have been one of them. Now suppose the question to be, not whether he aided John out of Kentucky, but whether he assisted this boy to escape from his master—is the proof sufficient to convict him? The charge that Mahan either in Kentucky or in Ohio connived at, or secured the escape of John, is not made out. There is therefore no legal proof of his guilt even under the gentleman's construction of the law, and of course, allowing the position to be assumed here—he cannot be convicted.

But my purpose is not to comment upon the evidence. That is unnecessary on account of the position taken on the part of the commonwealth. And what is that position? I will repeat it. It is this: *That a citizen of Ohio, living there, and never having set foot on the soil of Kentucky, is yet amenable to her law.* This doctrine surprises me; it is new and grates harshly upon my ears, and sounds as if it were the dogma of some despot. True, I am not so old as others in my profession, nor yet so learned; and I may not know how much of good there is in it. I am cheered at any rate in hearing gentlemen avow that this is the doctrine of the common law, and the law of the State. These are good tests. I wish none better. I will add only one more; and one I am sure, to which none can object: the Constitution of the United States. And if we apply these tests fairly, if we examine them honestly with the view of ascertaining what they do declare on this subject, we shall have no difficulty. The truth is in them, and we shall find it if we search.

they concern the common weal, and start up questions vital to its welfare. Nothing then, selfish or sectional, nothing narrow or illiberal, no passion, no excitement should now be felt or fostered. The occasion is solemn; it calls for deliberation and self-restraint. Let the conduct of all therefore, in every respect be worthy of it, and make us as an order-loving and a law-obeying people.

Respect for Kentucky demands this from all her citizens. For who is before them, and on his trial? The stranger;—one who lives among another people, and under other laws; one too, who has been delivered up to them only from the sternest convictions of duty. Admit, as is contended, that he has disturbed the quiet and endangered the property of Kentucky; the appeal to her citizens to obey and sustain the law is, on this very account, stronger and higher. For if this be so, if under these circumstances Mahan is acquitted and allowed to go unharmed and untouched; theirs will be the proud boast, not only that they knew the right, but possessed the virtue to maintain it.

Respect, too, for Ohio demands this conduct. There is excitement here: your Honor sees it—I see it. But there is excitement also in Ohio, and her eye is upon this people, and her ear awaits with impatient anxiety the result of this day's trial. I refer now to no party; I speak of the friends of Kentucky; of the friends of the law; of the friends of this Union. All—all of us are full of anxiety. And why? Not because we sympathize with crime; not because one of our citizens is imprisoned; but because we believe that citizen cannot be convicted here and now, without violating the law and the Constitution. Ohio has done her duty; Mahan was delivered up by her in obedience to the law. Respect for Ohio then, demands that the law and the law only shall govern, and if the people of Kentucky are true to themselves and to her, they will sustain the law with chivalric promptness.

But why urge these considerations? This Court feels them, and will do its duty. But this jury, who are now about to try a man for an offence hated by them—do they realize their force? They do, and I rejoice to know it. I rejoice to believe too, that the people around us realize the force of these considerations: it is a good omen; it argues well for law and for liberty. Judges are on their guard, are cool, are wise, and rarely allow passion or prejudice to control their course or direct their decisions. But it is not so with the people. They feel strongly, and act rashly, whenever their property is endangered, or their rights invaded, and it is natural that they should thus feel and act. An exception to this rule, (and a noble exception it is,) we now behold. I do rejoice then, in the spirit which is now manifested, and though there is a strong excitement among this people, yet their sympathy I am sure is in full unison with the wish of the Court; that in all matters touching this trial, and the prisoner at the bar, right, law, and not passion or violence, shall prevail.

I approach the case then without anxiety, and shall proceed to comment upon the law as it is, and as it is conceived to be, with fullness and freedom. The indictment will inform us of the cause and nature of the accusation; I desire therefore, that it may now be read.

[Here the Indictment was read.]

The indictment is specific, as it ought to be, in its charges. It alleges;—

1. That John B. Mahan was in the county of Mason on the 19th of June.

2. That at that time and place he did aid and assist a certain slave named John, the property of one William Greathouse, to make his escape out of and beyond the State of Kentucky.

Now I supposed that it would be necessary to prove these charges to the very letter, and concluded if this could not be done, that the case would be abandoned; I am mistaken. The Commonwealth's attorney thinks otherwise; nay more, he and the gentlemen associated with him admit, that John B. Mahan was not in Kentucky at the time alleged in the indictment; nor before nor after it; and consequently, that he did not aid and assist the slave out of this State: and contend that if he aided and assisted that slave in Ohio, he has violated the Kentucky law, and must be convicted.

Well, be it so. For the sake of argument let us admit the gentleman to be right. Is Mahan guilty, then? Give the evidence its fullest force; stretch it as wide as may be; and is it strong enough to convict him? It discloses many things which I could have wished had been otherwise. But there is nothing in it which proves that Mahan any where aided John in escaping from his master. What is the evidence? It is the confession of the prisoner; a species of proof which experience teaches us to receive with caution, and which the courts of Kentucky in the most marked manner have discountenanced. And to whom was it made? To a deaf man; to one who could not hear the questions put to him unless uttered in the loudest voice. And what after all does this confession amount to? Why that Mahan was in the habit of aiding the escape of slaves; that means were provided him for this end; that he wished the witness to join him; that he had an agent in Maysville, that fifteen negroes had been sent to him, and that he believed Greathouse's John to have been one of them. Now suppose the question to be, not whether he aided John out of Kentucky, but whether he assisted this boy to escape from his master—is the proof sufficient to convict him? The charge that Mahan either in Kentucky or in Ohio connived at, or secured the escape of John, is not made out. There is therefore no legal proof of his guilt even under the gentleman's construction of the law, and of course, allowing the position to be assumed here—he cannot be convicted.

But my purpose is not to comment upon the evidence. That is unnecessary on account of the position taken on the part of the commonwealth. And what is that position? I will repeat it. It is this: *That a citizen of Ohio, living there, and never having set foot on the soil of Kentucky, is yet amenable to her law.* This doctrine surprises me; it is new and grates harshly upon my ears, and sounds as if it were the dogma of some despot. True, I am not so old as others in my profession, nor yet so learned; and I may not know how much of good there is in it. I am cheered at any rate in hearing gentlemen avow that this is the doctrine of the common law, and the law of the State. These are good tests. I wish none better. I will add only one more; and one I am sure, to which none can object: the Constitution of the United States. And if we apply these tests fairly, if we examine them honestly with the view of ascertaining what they do declare on this subject, we shall have no difficulty. The truth is in them, and we shall find it if we search.

For this end, therefore, and in order to bring the questions now in dispute directly before the Court, the counsel for the prisoner have moved your Honor, not only to exclude the evidence, but to instruct the jury upon the following points:

1. Whether a man must not be tried in the county where the crime is committed.

2. Whether if an offence be not committed in the county, and the offender lives out of and beyond the limits of the State, and has never been in the State, the Court has jurisdiction.

These points then, I shall consider in the order stated, and in doing so I shall examine the common law and the law of Kentucky, and the Constitution of the United States.

1. Whether a man must not be tried in the county where the crime is committed.

And first as to the common law. Magna Charta, Sir, is a familiar name. It was wrung from the grasping hand of tyranny, and is truly the record of British freedom. It is in part before me, and I find one of its fundamental provisions to read thus: "That no man shall be arrested, nor imprisoned, nor exiled, nor deprived of life, nor in any manner injured, or proceeded against, but by the judgment of his peers, or the law of the land." Could language be stronger? Could authority be more direct? It is conclusive, and if this great charter of liberty be, as my Lord Coke says it is, a mere affirmation of the common law—then, Sir, this point is settled.

But the proof is clearer and stronger still. For our English ancestors were so jealous on this subject, that they left nothing to mere discretion. It was not enough for them that the charter secured to every man a trial by his peers, and the law of the land. They guarded this provision still closer, and the law was that these peers should be from the vicinage of the county where the crime was committed. For this purpose the venire facias always directed the sheriff to summon a jury from the neighborhood of the parish or place within which the fact to be tried was alleged. Nay, so very essential did the common law deem the having some of the neighbors on the jury, that, if the visne appeared on the record to be from a wrong place, it was a mis-trial, and a good ground for a motion to arrest the judgment, or reversing it by error. Cro. Eliz. 266. Hob. 5.

Admitted, answer the gentlemen. Such was the law; but it is not so now, and the English courts have authority to try crimes committed in the Indies, and in certain cases, offenders who may have escaped into England, from Scotland or Ireland. Granted. But whence came this authority? Not from the common law, but from Parliament. The common law never gave jurisdiction in these cases, and even now offences committed in Scotland or Ireland are indictable only there. On this point the authorities are uniform. I find on examination no diversity of opinion; nor do I believe an authority can be produced, (and if there be such I call for it,) which declares that offenders may be tried in counties, much less countries, where the crime was *not* committed, without the court stating expressly that such offences were made cognizable by the common law, but by act of Parliament.

I need not say I believe; I know such to be the fact. For so far was this principle carried at one time, that if a man was wounded in one county and died in another, the offender at common law, was indictable in neither, and escaped. True; Parliament wisely interfered here; and it has done so with equal propriety in other cases, making changes upon the same principle that our legislatures have made them. But its acts are exceptions. Thus the authorities one and all declare them. All the law and the decisions referred to by counsel on this subject, may be good law; I shall not dispute it. I say only, that it does not apply, unless indeed the old reason and all reason on this point, viz. that the exception proves the rule,—has suddenly been reversed. Yet this is the course pursued, and gentlemen rely upon the exception, not to prove, but to subvert the general rule! But it is all vain and useless. The law is clear. Look at it, for instance as applied now to the grand juries in England; they are sworn only to enquire for the body of the county. "They cannot," says Mr. Justice Blackstone, "regularly enquire of a fact done out of that county for which they are sworn, unless particularly enabled by an act of parliament." Look at it also in its largest sphere; the great principle of Magna Charta is still the law of the land. "In general," declares the high authority just quoted, [and when referring to the acts of parliament, and the very decisions made under them upon which gentlemen now rely as exceptions, "*in general, all offences must be enquired into, as well as tried, in the county where the fact is committed.*"]

The common law is clear; let us secondly inquire what is the law of Kentucky on this point? There is no difference. Nay, I do believe that on this particular subject, the legislature of this State has been truer to the common law than the British Parliament. For it has provided directly that the place where the crime is committed is the place where the offender must be tried. If a man for instance, strikes another in Mason, and he dies in Nicholas, or if he poison him in Mason and he dies in Nicholas; or if a man commits treason in Mason or be accessary to murder or any felony here, and escape and be arrested in Nicholas—in all these cases Mason is the only place where the offenders can be punished. The practice too, of the courts is in full conformity with this principle. For if a crime is committed in Nicholas, and the offender be indicted here—he escapes, and no power can prevent it. How then, can it be contended that a man can be convicted for a crime commenced and consummated, not only out of this county, but out of this State. The thing is preposterous.

"Not so, say the gentlemen. What you state as to our law is true. But the statue which Mahan has violated, is an exception, and gives this authority." How? That statute is before me, and I see nothing in it which contravenes the general rule. It says, "*if any person*" shall aid a slave in escaping, &c., &c. But are these words unlimited? Do they apply to Canada? Can they reach the Ohian who has never trod on this soil? Unquestionably not. Mark the phraseology of the statute. If any persons aid slaves, they shall be punished—for what? for assisting them "to escape to parts without the limits of this State, to any other state or foreign country." Now in legal contemplation, how can a man aid a slave to escape *without* this State or assist him *to* another, unless he be himself *within* this State? The words, "without the limits of" and "to another'

prove clearly that the statute refers to acts done in Kentucky. Besides, any other construction would enable this State to govern the world. But the law itself, fairly construed, does not warrant such an inference; and must be taken only to apply to persons who had been present here, and were subject to the jurisdiction of the court. I think this ground, therefore, untenable.

The truth is, the law and the Constitution of Kentucky are clear and decided on this subject; the provisions of both are familiar to your Honor. I have referred generally to other statutory enactments, and the practice of the courts under them; but I will now be more particular. I find the statute of 1796, sect. 24, regulating criminal proceedings, provides;—"That the grand juries in making any presentment, shall specify the crime presented, and *the time and place* where it was committed." And has this been done here? or the time and place stated so far as regards Mahan, in this presentment? Sir, the sworn officer of the State admits that they are not; admits that Mahan has not been in this county; admits that he has *here* committed no crime:—and yet he urges his conviction! But I do not mean to press this matter; I refer to the law to show that the time and place must be alleged, and of course proved as alleged. But there is yet a higher authority; the constitution of this State guaranties this right to every citizen, and it does so in the very spirit of the common law, and almost in the language of the Magna Charta. It provides—"That in all criminal prosecutions the accused hath a right" "to a speedy public trial by an impartial jury of the *vicinage*," "nor can he be deprived of his life, liberty or property, unless by the judgment of his peers, or the law of the land." Now where is Mahan's vicinage? where are his peers? Where, Sir, is his law? Not here, not in this county or State, but in Ohio, and in Ohio alone. But I do not mean to urge this consideration; I quote the constitution to prove, that the county where the crime is committed is the only place where the offender can be tried, and it does so prove it beyond the power of cavil or controversy.

I think then, I may say the first point is settled; viz. that both the common law and the law of Kentucky decide, in the language of Mr. Justice Blackstone —"that all offences must be enquired into, as well as tried in the county where the fact is committed."

And now, Sir, I ask how it is that John B. Mahan is in bonds before you this day? The law repudiates the principle for which gentlemen contend. I ask then, how is he here, and a prisoner at your bar? Before me is the indictment; but that is stained with falsehood. It alleges that John B. Mahan late of this county, was here at a particular time, and at that period violated the law; and now it is admitted that all this is untrue. How then is he here, and as a felon? By construction; aye, Sir, the principle of the Star Chamber, the very principle that has glutted the tyrants' worst passions has been resorted to, to render him amenable to the law. This is the argument—Mahan was not here in person; nor did he here commit the crime alleged; but the statute says, *if any person* aid a slave to escape he shall be punished; now Mahan in Ohio did aid a slave thus to escape; therefore he has violated the statute, and may be held and punished for such violation in this county and State. Thus by construction is he made to be here at a particular time, and by construction to commit here a par-

ticular offence! Sir, if this doctrine were uttered when men's minds were not warped by prejudice, it would be scoffed and scorned by every free spirit. It is not, in any of its phases, right; it is false to liberty—it is false to law.

2. I come now to the second point: whether if any offence be not committed in the county and state, and the offender lives out of, and beyond the limits of the state, the court has jurisdiction.

And first, as to the common law. Here as on the other point, the authorities are direct. I will read a few of them, and I think the gentleman will find their language stronger than they had anticipated. "It is," said Mr. Justice Buller, "a general principle, that the penal laws of one county cannot be taken notice of in another." 3, 7 R. p. 733. Lord Ellenborough too, in a late case, 6 M. & Selw. 99, affirms the same doctrine. "Penal laws," said Lord Loughborough, in a decided case, "penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority. A fugitive who passes hither comes with all his transitory rights. He may receive money held for his use, and stock, obligations and the like; and cannot be affect. in this country by proceedings in that which he has left, beyond the limits of which such proceedings do not extend." I have before me other authorities; I deem it unnecessary however, to read them: I remark only that so far as I am acquainted, they are equally decided.

Nor can I conceive how it could be otherwise. The very idea of nation, carries with it an inherent right on its part to make its own laws, and control its own territory. This is the attribute of sovereignty. Besides as to criminal laws, even if this were not the general rule, such must certainly be the case. For crime is local; it is often too, created by law,—it is rarely viewed in the same light, or punished in the same way, by different nations; nay, what is deemed penal in one country may be regarded as a noble virtue in another. Thus is it in Europe now with regard to political offences. The country then, where the crime is committed, has alone cognizance over it. No other nation can punish it, and hence is under no obligation to notice it. It is plain therefore I repeat, that the laws of one country have no intrinsic force except within the jurisdiction of that country. Mr. Justice Story states the rule broadly and without qualification. "The common law," he says, "considers crimes as altogether local, and punishable exclusively in the country where they are committed."

But we are met in reply to these authorities and arguments by extreme cases. Many nations, it is said, are separated by a mere line. Suppose a man on one side shoots down his neighbor on the other side of it. Here the murderer is in one nation; his victim in another. Now must not the offender escape? No; he will be punished. But why? Not because this nation has jurisdiction over that; but because they agree from comity, from mutual convenience and mutual necessity to give each others laws in these cases extra territorial force; otherwise the offenders must escape. For I repeat the remark again, that no nation or its subjects are bound to yield the slightest obedience to the laws of another nation. "Whatever extra territorial force they are to have," states the high authority last quoted, "is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to

yield to them, giving them effect with a wise and liberal regard to common convenience, and mutual necessities."

Upon this point the common law is clear. I propose now, in the second place, to inquire whether it is binding as between the States of this Union.

I think it is. I think too it ought to be. True; these States, form what is termed the Union, and ought not, and I hope never will be foreign to each other; but so far as regards criminal matters, I do not see how it could be otherwise. There is no uniformity among the States; there is not and there cannot be, a common standard. Crimes are punished differently in the different states, and each enacts such laws as the occasion demands, or its sense of justice dictates. How is it possible then, to make the penal acts of one state operate in another? Besides, according to an old rule, and I think a good one, it would be unjust to ask it. The humanity of the law supposes the power to punish and the power to pardon, to exist in the same authority. But that could not be, under this state of things. For the power of pardoning does not extend beyond the jurisdiction of a state, and cannot operate upon an offence committed within the limits of another state. Give then the penal laws of each state force in all, and unless offenders never leave the jurisdiction wherein they were convicted, no matter what may be their hopes or efforts, their repentance and reform—there is no pardon for them. The stigma of the law is upon them, and there it will remain forever.

But this is not all. Such a result would shake the very foundations of society. Take a familiar example,—here are two neighboring States, the one tolerating, the other prohibiting slavery. Now how can the laws regulating this institution, and the rights of property growing out of it, apply to both? No good could result from this extension of authority. Good, do I say? I see nothing in it but the promise of confusion, contention and dispute, and all the consequences of tumult and strife. The thing Sir, is impracticable. But there would be yet another and a deeper evil. The principle, that the penal laws of one state have no operation on another state is based, as I understand it, upon the equality and independence of each. It is, as I have said, the attribute of sovereignty. To deny this then,—to say that the laws of one state have extra territorial force in another, is to surrender all claim to this equality—this independence. Now are the slave states prepared to make this surrender? Are they prepared, Sir, to admit that the free states may enforce their laws within their limits? I speak now to one point, and I sav that the safety and the hope of these States rest upon the fact, that the law has fenced in and hedged up their supremacy so that none can violate it without trampling upon the highest obligations. Kentucky is supreme —but let her pass the Rubicon, let her contend for good or for ill that she has jurisdiction in other states, and she will make a breach in the wall of the Constitution through which the floods may rush in, and overwhelm her. Looking at this matter then, simply upon its merits, I pronounce it impracticable, unjust and dangerous. It can not be enforced anywhere; I know it will never be acted on in this country.

But I am reminded here that these arguments have been met, and an answer is asked to the case put. I am ready, Sir, to respond to it. "There is," it is sup-

posed, "a line formed, commencing at this place and extending through Ohio to Canada; the object of which is to further the escape of slaves. Now the men who belong to it in Ohio, are as guilty as the men who remain in Kentucky. And are they to escape? Are they amenable to no law? While thus violating our rights and destroying our property, ought they not to be, and are they not, punishable by our law?" Sir, the case is a hard one, and it is well and strongly put. But I shall meet it, and I tell the gentlemen plainly, that by the laws of Kentucky, they who thus act, bad as they are, shall not be touched. Better far would it be that the property of both States, and every living thing in both, were annihilated, than sacrifice this principle. No. The law of Kentucky does not and cannot operate in Ohio.* "And must these men," it is asked, "be allowed thus to endanger and injure, and irritate and annoy us without check or control?" Not so—not so, Sir. From comity, foreign nations allow extra territorial force to each others laws. But a higher principle governs us. We are one. Every thing then,—the memory of the past and the hope of the future, duty, the right, the spirit of the Union, calls on the states to guard each others welfare as their own. No wrong should be done—none tolerated. But when wrong is thus done the state injured should appeal, not to any original power of her own, but to the justice and patriotism of her sister state, to remedy that wrong. The assertion of the former will always be resisted. An appeal to the latter will rarely remain unanswered.

But really this is not a moot point. The doctrine is decided by the highest tribunals in our land. "We are required," said Mr. Chief Justice Spencer, in an important case, "to give force to a law of Connecticut which inflicts a penalty for acquiring a right to a chose in action. The defendant cannot take advantage of, nor expect the court to enforce the criminal laws of another state. The penal acts of one state can have no operation in another state. They are strictly local, and affect nothing more than they can reach." 14 John. p. 338. I beg also to cite the case of the Commonwealth vs. Green, 17 Mass. Rep. 543. The opinion is given by the late Chief Justice Parker, a renowned and venerable name, and is full of close and strong reasoning. I have already urged many of the arguments contained in it, and as the case is a long one, I shall only remark that it confirms throughout the decision of Mr. Chief Justice Spencer. One other authority I shall quote, and then I have finished this branch of the case. But that is so apposite that I cannot pass it by in silence. It covers the whole ground. "We cannot," declare the court, "*take cognizance of crimes committed in another state, even though the legislature of our own state had passed an act expressly making certain crimes so committed punishable in the same manner, as if they had been committed within the limits of our own jurisdiction.*"†

The common law on this subject is the law of the Union, and the penal acts therefore of one state have no force in another state.

And I must confess that I do not understand the opposition to this position. There are principles, Sir, about which men do not argue, and which few dare question. They are convictions rather; are the teachings of centuries; and start up before us ever as living realities—as realities which are a part of our very

* 10 Serg. & Rawle 125, 4 Johnson's Ch. Rep. 106, 1 Amer. State Papers 175.

† Taylor's N. C. Rep, State, vs. Taylor, p. 65. Story Com. p. 517.

nature. Such I regard the principle for which I am now contending. I feel it to be right; I believe it to be the result of many hard fought battles for freedom —I believe it to be in sympathy with all our purer and nobler feelings. I feel it to be truth; and modify and change and soften down as much as we may or can, the position assumed in opposition to this principle and now urged and defended, still its avowal will ever startle and shock us. For what is home, if its sanctity may be violated, and fathers and sons torn from it, and driven beyond the reach of kindred and friends, and all the aid and the law of home? And what too is liberty, if while treading upon our own soil, the hand of a foreign officer may seize us and bear us fettered, and as felons, into a foreign jurisdiction? Tell me not that the man who has been thus taken is a man who is a fanatic and mad. He may be as dark a villain as ever roamed the earth, for that I care not. The right to seize him confers the right to seize the best. I repel the doctrine then throughout; I repel it as unjust; as full of wrong; as unholy; as the instrument of despotism, and fit only for the despot's use. And if Kentucky adopt it,—if in an hour of error or irritation she will receive and act upon it, she will prove recreant to the principles of her fathers; will sacrifice to passing interest, future good—will mar her own hopes, set at naught her higher duty, defy law, and endanger, if not crush, the common weal. There is peril in it, Sir; let her shun it as she would her own shame.

But I propose another test as to the question of jurisdiction; the Constitution of the United States; let us examine it.

Allow me however before I notice its provisions, to say a word as to the first point. The first section of the third article provides, "that the trials of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where such crimes shall have been committed." Now this language is clear and strong. But clear and strong as it is, it did not satisfy our fathers. Individuals under this clause, it was argued, may be taken from one part of a state and tried in another and distant part of the same state. The objection was felt; and, Sir, it was removed. The sixth article of the amendments, among other things provides, "That in all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed." Thus we perceive that the framers of the Constitution were resolved to maintain the spirit of the common law, and for this purpose do I now quote their provisions.

But it is the second point; viz. whether a state has jurisdiction for offences committed out of and beyond the limits of that state, to which I wish now wish to direct the attention of your Honor. Much has been said, and I suppose more will be said about the common law, and the law of the state. I have spoken fully with regard to both,—I deem them important in this discussion. But after all it must be obvious to your Honor, if a state possesses original jurisdiction in another state, that this results, and can alone result from the Constitution of the United States. "For without that," says Mr. Chief Justice Parker, "the several states are entirely independent of each other, and as completely foreign one to the other, except so far as temporary confederacies may have united them, as any separate European governments. Whatever change exists in this relation, must

be sought for in the Constitution of the United States, and the laws of Congress made pursuant thereto."

What then, declares that Constitution? Enough to satisfy us that no such power exists. It is there provided, "That all powers not delegated to the United States, nor prohibited to the states, are reserved respectively to the States." Now the right to punish crime for a violation of the state laws, has not been delegated to the former, nor is it prohibited to the latter. This is clear. It follows then in this respect, that the states are supreme; are as much sovereign and as much foreign as though they were not united together. Nequi enim provinciæ fœderatæ uni supremo parent. Nor are they governed here by the higher power; or as we term it, the general government; a remark, says Mr. Justice Story, speaking on this subject, strictly applicable to the American States. But, Sir, the very clause quoted on the other side, and the only one referred to, appears to me to settle this question. I speak now of that clause which provides, "That a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state *having jurisdiction of the crime.*" Now the recognition here of the exclusive sovereignty of the states in regard to crimes committed within their territory, as well as the local nature of crimes and punishments, is perfect. It is as much so, as if that Constitution had declared that the jurisdiction of states, so far as regards its penal acts, shall not extend beyond their limits. And when beside, your Honor recollects the *decisions* made by our highest authorities, and which I have elsewhere noticed—all sustaining the position here assumed; nay, Sir, declaring that the court cannot take cognizance of crimes committed in another state, even though their own legislature had passed an act making such crimes so committed, punishable as if they had been perpetrated within their own jurisdiction—it does appear to me that the principle must he considered as settled almost beyond the power of attack.

And such is the law. For the Court, and for all, this is enough. But a consideration of the reason upon which that law is founded, will convince us that it *ought* to be as it is. And what is that reason? It is to guard against wrong; to ward off the tyranny of rulers, and stay a spirit of violence and vindictiveness on the part of the people. Rulers need restraint. The people, Sir, require it. For let their passions be stirred up and fed by resentment, and all bound up and hurled against one man, and how is he to escape? Take the very case before you. Let it be believed that Mahan is in conspiracy against Kentucky, that he is one of a band who are resolved to mar her peace and destroy her property; that for this end he has agents and spies among the plantations, and in the homes of her citizens; and be it too, that the evidence on which this belief is founded, is false: —what power, I ask, could rescue him from the vengeance of the people? There is but one,—the power of the law; and the law alone, in all cases of wrong and violence, and usurpation, is the only palladium which can protect individuals from harm, or save the people themselves from oppression.

But I must go farther. I hold this principle essential to the existence of our Union. This is no new saying. Our fathers so thought and spake. For this

very question, as to the equality and jurisdiction of the states, was early and thoroughly discussed by them, and was settled as it now stands, by concession and compromise. Under the old confederation, each state was sovereign. Was this to continue? Ought this to be so! These were the questions mooted in the convention, and for a time the states seemed divided. On the side of the smaller states it was argued, that they must stand as they had stood; that the general government ought to be partly federal, partly national; that thus alone could a just balance of power, and sovereignty, and influence be preserved among the states; that the larger states, under other circumstances, would usurp prerogatives and violate the rights of the smaller; that it was the only way to prevent a consolidation among the states into one republic; and that unless the weaker are equal to the stronger, they possess no power of self-defence, and are ruined. These arguments prevailed. The larger states yielded, and the Senate is a constitutional recognition of the "sovereignty remaining in the states, and an instrument for the preservation of it." Thus, then, stands the matter. The Union is supreme in all points transferred to it, and the states sovereign, in all those which are not transferred.

Let the principle, however, contended for be admitted; let it be that each state has jurisdiction in another, and what becomes of our Union? What will our boasted Constitution be worth? What will avail our checks, and the balance of power, and all our means to arrest usurpation and licentiousness? Tell me not that interest, patriotism and duty, would limit each state within the pale of the Constitution, and force all to feel and obey its provisions. We know, and all history and experience prove it, that with nations the present purpose, the immediate interest and ruling passion, and not law, not positive justice, not future good, control and govern. What then, would be the result? Sir, our Constitution and our laws would be dead instruments and passive tools, and our Union a rope of sand. For the larger states under this principle, would grasp at more than they have; would overleap their boundaries and extend their limits in extending their jurisdiction. Instead therefore of being as we now are, the envied exception to all nations, instead of having the Union and its members supreme in their separate spheres, "each having its independence secured beyond the power of being taken away by either, or all the others;"—instead of all this, we should have one empire, or several distinct republics, or states reduced to servile obedienec to other states;—complaining, yet without the power of redress; suffering, yet not daring to resist; in name free, but in fact colonist; aye, and it may be, slaves.

Do I exaggerate—is this picture colored? Sir, deeper and darker ills under this state of things, would beset us. War, and all the ills of war, would desolate this fair land, and break the spirit of our people, and bow their necks to the iron rule of despotism. For what has been the great cause of all war? What, Sir, has occasioned the ruin of all republics? Disputes, and often trifling disputes, about territorial limits—about jurisdiction; fomented by ambition, the desire to enlarge, and the wish to master and to rule. And how are we to escape these wars—how shall we prevent this result? Man is here, and is as full as ever, of ambition, anger, hate, lust, and the love of power. Bare open to him then, the

means of indulgence and he will here, and now, riot in excess. And will not the doctrine now sought to be sustained, produce this result? It must, Sir. For it mars all the fairer proportions of our system.—It cuts it up by the very roots. It opens wide too, the means of indulgence for all the baser and darker passions of man's nature, and will nurture, ripen and give them vigor. If then, we would prevent war and check violence, and arrest all usurpation,—if we would give our system vitality and infuse its spirit among the mighty mass, and let it pervade, nerve and cement the whole,—if indeed we would live, we must in the very onset resist this doctrine as if it were despotism itself.

My conclusion therefore, upon the whole case is this: That the common law, the law and the Constitution of Kentucky—the Constitution of the United States, all declare, that the accused must be tried where the offence is committed, and that the jurisdiction of a state does not extend beyond its territorial limits; and thus declaring, I hold that John B. Mahan, never having been in this county or state, has violated no law of the State, and that your Honor is bound, not only to exclude the evidence offered, but to instruct the jury that he is not guilty of the crime alleged in the indictment, and that the court has no jurisdiction over this case.

And now I cannot avoid asking if it does not seem strange to you, Sir, that these principles should be questioned and attacked here, and now? I can hardly realize it. But it is so. The effort is openly made to break down in America principles which both here, and in England, are thought to be the bulwarks of freedom, which Magna Charta declares sacred, and which man always has guarded with religious jealousy. I am amazed. Yet it is so.—All the zeal and all the energy and all the talent of the Commonwealth's attorney is exerted to the uttermost to erase them from the statute book. Vain effort, and idle as vain. As well attempt to batter down this massy building with his naked arm, as to pluck out from freemens' minds these rooted principles! No. The proud boast of British statesmen, that all bare and exposed as may be the poorest peasant's hut, the king cannot and dare not enter it; and the prouder boast still of the British people, that no subject can be touched or tried except by his peers, and the law of the land,—will ever be England's glory while England is free. And as for us, —as for us, Sir, we shall yield up these principles only with life or liberty.

I might stop here. I wish however, to mention two other considerations why Mahan should be acquitted. I cannot say that they ought to be urged upon the Court; I fear not. But your Honor, I am sure will overlook this impropriety, and pardon every thing to the spirit which induces me to state them.

The first consideration relates to the peculiar interests of Kentucky. Why this prosecution? Why this strong effort to convict Mahan? It is alone, and simply, to protect that interest; this, at least, is the strong and ruling motive. I believe gentlemen err. I believe the true way to effect this object would be to let the prisoner go; and I am sure if a misguided zeal had not caused his seizure, that this interest would stand on a firmer basis. For what has been the conduct of Kentucky with regard to *fugitives* escaping to her territory, from another state? By statute she has given the Circuit Court authority whenever a demand is made, to enquire into the matter, and if the fugitives are not identi-

fied, they are to be discharged; and further, in an amendment to this act it is provided, that if such fugitives are charged with removing slaves into this, from another state and are properly demanded, the Circuit Court is directed to enquire into the charge, and if such fugitives prove these slaves to be their property, they are to be discharged. And yet Kentucky here, and now, through her official agent denies a right to another state which she claims for herself! denies the right to Ohio to protect in any way fugitives, while she declares that she may and will protect them herself!—As if it were not just cause of offence between nations, for one state to demand from another a particular action, when at the same time and under the same circumstances, she refuses such action to that state.

But this is not all. Kentucky not only thus demands a privilege from Ohio which she refuses to grant to Ohio, but further openly contends that her penal laws operate in Ohio, and bind her citizens. Now does any one suppose that these claims will be allowed? Does the Commonwealth's attorney believe, can he, can any man believe, that Ohio would submit to such usurpation? All honest men would scorn her if she did. And what, I would ask, must be the result, if such pretensions are urged, and an effort is made to carry them out? I will tell you, Sir. Ohio will resist: but that resistance will be negative merely. She would simply refuse to deliver up fugitives when demanded by Kentucky. I remember well the provisions of the Constitution. I know it is declared that fugitives shall be delivered up when the demand is properly made. But under these circumstances, and with the construction given to the law here—with the conviction that, under such construction, her best citizens may be seized, and that too, through fraud and falsehood—Ohio would have no alternative. And what then would be the position of Kentucky? I ask your Honor, I ask thinking men, what then would be the consequence? Sir, under this state of things the peculiar property of Kentucky would be exposed to villains from within and from without—to men who, through fanaticism, or for hire, would steal, rob, and destroy;—exposed too, beyond the means of redress, or the power of protection! It does appear to me that it would be for her security to abandon the prosecution against Mahan, and with it, the doctrines which are relied on, to sustain that prosecution.

My second consideration is an appeal to the *honor* of Kentucky. I have referred before to the indictment; its contents are familiar to all. I need only say here, that its charge as to Mahan being in this State and county at the time alleged, is admitted to be incorrect. But there is another document before me touching this matter, which has not been referred to, and which I wish to notice. It is the *demand* of the Governor of Kentucky upon the Governor of Ohio. And what does it declare? That because John B. Mahan did aid certain slaves, the property of Greathouse, to escape out of, and beyond, the limits of the State of Kentucky, because he has fled from justice, and is going at large in the State of Ohio—the said John B. Mahan is demanded *as a fugitive from the justice of the laws of this State.* Now, Sir, did the Governor of Kentucky know that the prisoner had not been here? When he forwarded this demand, was he aware that the ground would be taken that this was not necessary either to seize or to punish? I venture to say, no. Did the Governor of Ohio, then, understand

these things? Was he informed that John B. Mahan had never been in Kentucky, and that the indictment was found upon the ground that, though living in Ohio, he was yet amenable to the law of this State? Never, Sir. I pledge myself that under these circumstances no governor of Ohio would ever have delivered him up, and I believe further, that no governor of Kentucky would ever have demanded him.

How, then, is Mahan here? Shall I declare it? I feel—every man must feel—that he is here because all the facts of the case were not stated in the indictment and the demand. I censure no one. I utter no complaint. I state the fact; that John B. Mahan is now here because the whole truth of the case was not set forth, as it ought to have been, in the indictment and the demand. And now, Sir, I put it to the attorney who represents the State, who would uphold her dignity and her honor, whether he can with the knowledge of these circumstances, press this trial, and seek the conviction of the prisoner? Sir, if I represented this State now, and it were proved that Mahan had endangered the whole property of Kentucky, and was ready when discharged to carry forward his work of destruction—he should go;—go free; go unhurt and untouched. And does the gentleman ask me why? Because, Sir, the honor, the truth, of my state should never be hurt or questioned whenever I had the power to prevent it. The escutcheon of Kentucky, it is said, is fair and pure. I believe it. But if this man is convicted, if having obtained his presence by a suppression of the whole truth he is doomed as a felon, a taint will be upon that escutcheon which no time or change can efface. And will this be? I know, Sir, that it will not. I know that the pride and principle of this State would scorn any and all deception; and I feel, therefore, in resting the defence of John B. Mahan as I now do, upon the law and her honor—that he must be acquitted.

But, Sir, I have done. I dread all conflicts between the states, and am anxious always to arrest them. For this purpose, I endeavor to strengthen the cords which bind them, by removing every cause of complaint, and every source of irritation. I feel, indeed, if this could be done, if the common resolve were simply in all *state controversies* to yield, rather than encroach, that we should cause this mighty republic to grow and expand, and rise up first, and far above the nations of the earth; a mark and a sign to be gazed at—not as a passing accident, or a dazzling wonder—but as a living reality to be felt and understood among men; a reality which should elevate man by securing freedom and growth to mind forever. The thought is glorious. And can not this result be secured? Can not *we* gain for our country this destiny? Aye, Sir, we can. We have the means. The power is in us if we toil rightly and toil together. Gaze on yon beautiful river which separates our states, and in tracing it from its source to the ocean, behold how it receives and forces upon us civilization and wealth, and all the regard which kindred pursuits awaken. Meditating upon these things when journeying hither, as I marked the steamer cleaving the waters of the Ohio, and watched the waves rolling in opposite courses, until seemingly they kissed either shore in token of love, I felt as if the very voice of nature murmured forth its eloquent sympathy in defence of perpetual Union. I hope this may be so, and that long as these waves shall roll, that Union may last; firm

from policy and interest; but firmer, and more enduring yet, through principle and affection.

To his Excellency, the Governor of the State of Ohio.

Whereas, it has been represented, by the affidadit of William Greathouse, that John B. Mahan stands charged by two indictments in the Mason Circuit Court of this State, in aiding and assisting certain slaves, the property of the said William Greathouse, to make their escape from the possession of him, the said William Greathouse, out of and beyond the State of Kentucky.

And whereas, information has been received at the Executive Department of this State that the said John B. Mahan HAS FLED FROM JUSTICE, AND IS NOW GOING AT LARGE IN THE STATE OF OHIO; and it being important and highly necessary for the good of society that the perpetrators of such offences should be brought to justice: Now, therefore, I, James Clark, Governor of the Commonwealth of Kentucky, by virtue of the authority vested in me by the Constitution and laws of the United States, do, by these presents, DEMHND THE SAID JOHN B. MAHAN, AS A FUGITIVE FROM THE JUSTICE OF THE LAWS OF THIS STATE, and make known to your excellency that I have appointed David Wood my agent to receive said fugitive, and bring him to this State, having jurisdiction of the said offence, that he may abide his trial for the crime with which he stands charged.

In compliance with the requisitions, I herewith annex and submit to your Excellency a copy of the indictments upon which this demand is founded, which I certify is authentic.

In testimony whereof, I have hereunto set my hand, and caused the seal of the Commonwealth of Kentucky to be affixed at Frankfort, the
[L. S.] 28th day of August, in the year one thousand eight hundred and thirty-eight, in the forty-seventh year of the Commonwealth.

By the Governor. JAS. CLARK.

J. M. Bullock, *Secretary of State.*

The authorities referred to by Mr. Vaughan were omitted by mistake. They are mentioned here and the pages in which they ought to appear are referred to—

Pages 24 & 25—4 Black. 240. Chitty's Notes. 3 Thomas Coke, p. 505. 2 Hale's P. C. 272. Rex vs. Munton, 2 Espi. p. 62.

Page 27—1 H. Black. 135. Story's Com. Laws, p. 517. 14 John. 340.

Page 28—Story's Com. Laws, p. 7. 17 Mass. 540. Hargrave's Notes to Littleton, 79, b. note 44.

Page 31—17 Mass. 550. Story's Com. Laws, 520. 4 John. Chan. Rep. 106. 1 Kent., 2 vol. p 36. 2 Ftrange R. 843. 1 Vesey Sen. 246. 1 Amer. Jur. 287.

Page 32—Federalist, Nos. 15, 23, 62, 63. 1 Wilson's Law Sec. 296. 2 Pilkins' History, 233, 283. 4 Elliot's Debates, 62, 68. Rawle's Com. 36, 37. 2 Wilson's Law Sec. 146, 147. Luther Martin's Letter & Speech, 1788. Story's Com., 2 Vol. 174—179.

Several mistakes have crept in inadvertently. On page 23, instead of "that he believed Greathouse's John to have been one of them," read—"that Mahan

told him (Perrigo) that he had seen two negroes by the name of John, one of whom belonged to Greathouse, who had come near catching him." On same page, instead "of allowing the position assumed here," read "and even allowing the position assumed to be correct." Page 30, for "*or* the time," read "*are* the time." On page 30, 4th line, "soften *it* down," the word *it* ought to be omitted. Same page "opposition to this position," read "opposition to this doctrine." Same page, "the man who has been thus taken *is a man who*," the words "is a man who" ought to have been omitted. But the intelligent reader will perceive these and similar errors, and we shall not notice them further.

Speech of Henry Waller.

Mr. Waller then rose and addressed the court as follows:

May it please the Court:—I agree with the gentleman who opened this discussion, that the question upon which it turns, is one of deep and vital importance—that its effect is not to decide upon a contention between individual and individual, over private rights; or to ascertain the respective privileges of individual citizens of different states: neither sir, is it limited to an inquiry, vouching the character, life, or liberty of an isolated individual. But it is a grand question of state jurisdiction and national right. It is a question which reaches the most sensitive principle incorporated in our institutions; one which is already agitating this entire Union to its farthest extremities, and under the influence of which, our Republic even now, trembles to its deepest foundations. And, sir, I will hazard the opinion, that upon the final settlement of this controlling principle, when carried out into its widest application, must hang the hopes, the fortunes, the destiny of this confederated people, for all time to come.

The gentleman was right when he said, that a subject of such grave and solemn moment, should meet with an examination, calm, full, and fair. Sir, no influences springing from passion, or undue prejudices, should find their way into such an investigation. Sir, it is no field for the display of heady zeal or unbridled excitement. And if a native born Kentuckian may be presumed to know the feelings and sentiments of Kentuckians, I would unhesitatingly declare that any other course would be wholly abhorrent to every Kentucky bosom. But whilst such are their wishes, they are equally decided in their convictions, that this question must be encountered at once, and must be met boldly and broadly, as it should be fairly and honorably.

The representation from Ohio, has been pleased to ask, "Whether Kentuckians would prove recreant to the principles of their fathers." In answer to that inquiry, permit me to remind him, that in times of public peril, Kentuckians have ever been as prodigal of their blood, as of their treasure; and that they have ever been ready, aye sir, amongst the foremost, to lavish life and fortune, for the common safety. Let me remind him, that in the late war, when a merciless and savage horde hung, in portentous strength upon our defenceless frontier, Kentucky valor contributed to sustain the hopes, and move with fresher vigor, the

arm of an *Ohio* chieftain: that Kentucky and Ohio blood, flowed and commingled upon the *soil of Ohio*, in stern resistance to a foreign foe. Will not the gentleman join me in the hope, that the exhalations from that battle-field, have risen like the flames of sacrificial fires upon a common altar—in token of a *common devotion?*

He referred, sir, to the fact, that the waves of 'the beautiful river' kissed the shores of either state—so he has eloquently expressed it—as they dance onward to the ocean; and has applied it as emblematic of the continuous interchange of kindred feelings which should be cherished between the states. Sir, Kentucky claims and appropriates this sentiment in common with Ohio. She looks out upon the plain ordinances of nature. She sees that the smallest and gentlest breeze that fans the forests of Kentucky, undulates along the grain-laden fields of Ohio. That the same cloud, as it floats through the empire of the upper air, dispenses alike, its showers upon either shore, and firtilizes equally, the fields of the sister states. And as Providence has decreed, that the rainbow—that divine seal of a sacred covenant between man and his maker, should simultaneously stretch his glories over both lands, with one extremity upon Kentucky, the other upon Ohio—Kentucky indulges the hope, that it may be taken as an omen of the undying affinity between the two sovereignties;—and that the feelings and kindred sympathies of their communities may be as closely interwoven, as are the gorgeous hues of that eternal sign of the skies.

It is with this spirit sir, that Kentucky meets this question, and in such manner does she respond to the appeal from the representative from Ohio. But he has told us, that it is a good principle to *concede*, rather than *encroach*. Whilst we admit the soundness of the general principle, we must be excused for dissenting to its present application. Sir, it asks too much; and in answer, we must refer to the reply our sturdy forefathers rendered to their oppressors, in justification of their course. It is not over the paltry price of the *commodity*, that we contend, but the surpassing magnitude of the *principle*. Kentucky would scorn to *encroach*; and she is ready to *concede*, when the concession is not deep national concern; but she will ever sternly assert her utmost rights, where her institutions and her dearest interests are at stake.

But I must henceforth limit myself to a discussion of the legal points arising upon the motion before the court.

The motion is in these words:

"The evidence on the part of the prosecution having closed, counsel for the accused move the court to exclude the whole of it from the consideration of the jury, as wholly insufficient to prove the offence charged in the indictment."

This, sir, it will be perceived, is in the nature of a *demurer* to the evidence before the jury. It admits to the fullest extent, the truth of the facts disclosed by the testimony, together with all the inferences which may be reasonably and consistently drawn from it, but denies their competency to produce conviction under the provisions of the law. It is not a demurrer to the indictment; for the issue is not on a point of law on the indictment, the fact *as there stated*, being admitted to constitute a felony under the statute. I am guided in assigning this character to the present motion, by the definition given in the elementary writers

to a demurer to an indictment. Blackstone, vol. 4, p. 334, thus defines it: "This is incident to criminal cases, as well as civil, when the fact alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alledged to be." The motion now pending, presents precisely the same question with regard to the evidence, that it is involved in this definition touching the indictment. There is no formula or definition of a demurrer to evidence in criminal cases, known to the commentators or reporters. It has neither authority nor precedent to support it. I characterize this motion, therefore, as being to the *nature* of a demurrer to the evidence. And such being its nature, this motion cannot prevail, because

1. A demurrer to evidence in criminal prosecutions, is altogether unprecedented and unknown to the law, on the contrary, it is directly disavowed by the highest judicial authority in our country.

I refer your honor to Burr's trial, vol. 2, p. 352. Mr. Martin, one of the counsel for the accused, there contends that the question of law, in criminal cases, "may be brought before the court by a demurrer to evidence: that is, the party may state all the evidence which has been brought forward, *and admitting the truth of the whole of it, and other facts which the jury would have a right to infer from those actually proved*, he may call on the court to decide on the legal effect of the evidence thus adduced." This is distinctly and plainly the position occupied by the defence in the present motion. But he is interrupted by Chief Justice Marshall, who asks the question—"*Was there ever a demurrer to evidence in a criminal case?*" Mr. Martin—Though it be not the practice, I presume that if there be no positive authority against it, there is no principle to forbid it.

"Mr. Hay,—If a demurrer to evidence be admitted, what would become of the jury?"

"Here a desultory conversation took place. Mr. Martin observed that the law was general without exception, and that the general effect of a demurrer to evidence was to withdraw the decision of the case from the jury, the facts being admitted by it, that the jury were bound by law in criminal as well as in civil cases; but he added that *he must be candid enough to admit that the law as generally stated in the books, was against him on this point*, though he thought it difficult to give a good reason for the exclusion of a demurrer to evidence in criminal cases."

The opinion of the Chief Justice is here so plainly intimated, and the surrender of the point so unequivocal by the learned counsel of the defence, that I shall not consume the time of the court by argument or additional authority.

2. This motion if indulged, would in effect, transfer the right of trial to the judge, and thereby rob the jury of their rights, as ascertained in common law, and the constitution of our own state. That this would manifestly be the result, cannot, I conceive, be questioned.

I read from Blackstone, vol. 1, page 361. He is speaking of the province and rights of the jury. "They cannot in a criminal case, which touches life or member, give a *privy* verdict. And such public or open verdict may be either

general, guilty, or not guilty, or special, setting forth all the circumstances of the case, and praying the judgement of the court, whether for instance, on the facts stated, if it be murder, manslaughter, or no crime all. This is where they *doubt* the matter of law, and therefore *choose* to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a *general* verdict, if they think proper so to hazard a breach of their oaths: and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attaint at the suit of the king; but not at the suit of the prisoner. But the practice heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the judge, was arbitrary, unconstitutional, and illegal. For as Sir Matthew Hales well observes, it would be a most unhappy case for the judge himself, if the prisoner's fate depended on his directions; unhappy also for the prisoner, for if the judge's opinion must rule the verdict, the trial by jury would be useless." This happy language cannot easily be misapprehended. Apply the principles embodied in it, to the motion now pending. The court is asked to exclude the whole testimony from the consideration of the jury—Why? because it is incompetent to prove the offence charged." This is nothing less than requesting the court to say to the jury, that "on the facts stated," "no crime at all" has been committed, the very question which Blackstone says, the jury have the unquestionable right of determining themselves, or of submitting by special verdict to the court, in case they *choose* to do so. I would ask your honor, whether you would not by sanctioning this application, "*rule the verdict?*" If so, Blackstone contends that you render the *trial by jury useless*, You would place yourself sir, in the unhappy case," spoken of by Sir Matthew Hale, and would tear out the very key-stone from the arch of American, as of English liberty.

But sir, we are not forced back upon English authority to support our position. The Constitution of Kentucky contains this principle so distinctly stated, as to show the extreme and anxious jealousy with which our fathers guarded it. It acknowledges, and secures to even a *greater extent than the common law*, the right of the jury to "determine the law and the facts" of the case. Will not your decision in favor of this motion, render nugatory, and utterly unavailing, this conservative feature in our constitutional law? Can your honor respond affirmatively to this motion, without determining the law involved in the final issue of this cause, and without making a definite and conclusive application of that law, to the facts in evidence? I shall prosecute this inquiry no farther, solemnly assured that this court will never dare to palsy the energy of this fundamental and popular principle of our policy. 3. The evidence given on the part of the Commonwealth should not be excluded from the consideration of the jury, *because it is sufficient and competent* "to prove the offence charged in the indictment."

This proposition opens the whole field of discussion, and strikes directly at the vital principle at issue. Let us look into the evidence, sir, and settle its true bearing, before we proceed to the question of law. And in stating the evidence, I shall content myself with a succinct statement of the prominent points which mark its character and relevancy.

I understand these facts to be in evidence before the court: That the accused stated to Perrigo, the principal witness, that during the preceding month, *fifteen* slaves had passed through his hands, on their way from Kentucky to Canada, and of that number, two belonged to Mr. Greathouse (being the slaves named in the indictment)—that there was a line of posts, reaching from *the friends* in Kentucky to Canada, with the express view of forwarding fugitive slaves from this state—and that when they were once safely arrived at his house, they were secure from the danger of apprehension—accused at the same time, made the proposition to the witness to embark in the same enterprise, offering to pay him for his services, and when the witness hesitated, the accused assured him there was no danger, for that there was a colored barber in *Maysville*, who sent him all he could. Here sir, is proof of an attempt to *hire an agent* in Ohio for the purpose of aiding the escape of slaves. And as an argument to show that the service is not dangerous, the person applied to is referred to one who performs the same duty *in Kentucky*, without molestation. Is not the inference strong, that the barber in Kentucky; being in the same service, communicating with the accused, and pointed by him as an example, is employed by the same individual and by the same means, as he who is proved to have been thus tampered with? If Perrigo was offered a *hired agency* by the prisoner, are we not justified in concluding that the barber was engaged in a *similar* agency, and by the same individual? And if the barber was a hired agent, shall we conclude that "the friends alluded to by the prisoner, were so many agents of the same kind, disposed along the Kentucky shore? Certainly the inferences are highly probable, if not *powerful.* I take the position then, as strongly supported by the same proof, that Mahan, the prisoner at the bar, by *hired agents* in Kentucky, aided and assisted the escape of the slaves named in the indictment; from their lawful owner. Is he guilty under the statute, and has he rendered himself subject to the jurisdiction of the state of Kentucky?

I confess to you, sir, that I approach this question, important as it is and involving the most subtle legal distinctions, with a thorough distrust of my own abilities to do it justice, but with a firm and rooted conviction of the truth of the principles for which I shall contend.

The preliminary principle which I lay down is this: that the statute upon which the present indictment is based, admits of no accessaries, either *before* or *after* the fact, but that all who in any wise come within its provisions, are *principals* in the crime committed.

The first section of the statute is in these words,—

"*Be it enacted, &c.* That if any person not having lawful, or color of claim thereto, shall be guilty of seducing or enticing any slave to leave his lawful owner or possessor; and to escape to parts without the limits of the state, to any of the other states, or a foreign country; or shall make or furnish, or aid and assist in making or furnishing a forged pass of freedom, or any other forged paper purporting to be a deed of emancipation, or will, or other instrument, liberating or purporting to liberate, any slave, *or shall in any manner aid or assist such slave in making his escape from such owner or possessor, to another state, or foreign country;* every person so offending, shall, on conviction, be sentenced to

confinement in the jail and penitentiary of this Commonwealth, a period not less than two years, nor more than twenty years."—Statute Law of Kentucky 2d vol. page 1302.

This embraces all of the statute law applicable to the offence charged. And from its terms it is clear, that all who offend it are guilty as *principals*, because,—

1st. The *nature of the crime*, as defined, declares it. The crime is not the *escape itself*—that is the part performed by the slave himself. But the crime consists in the *aiding or assisting the escape in any manner*. The *manner* is not material; nor is one mode viewed by the statute as involving more guilt than another. There is no distinction as to the manner recognized, no classification, no gradation. He who aids or assists in one way, is as guilty as he who assists in another, and all who come within the provision of the statute, commit the same crime and must suffer the same punishment.

2d. The statute furnishes none of the reasons for the distinctions traced by the common law, between principals and accessaries. I refer you, sir, to Blackstone, vol. 4; p. 39. He is discussing those distinctions, and thus assigns, in order, the reasons which originated them: "1st. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the commission of an actual robbery being quite a different accusation from that of harboring the robber. 2d. Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy, a distinction is made between them. 3d. Because formerly no man could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same time with him. 4th. Because, though a man be indicted as accessary and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counselling a felon, is no acquittal of the felony itself." A comparison of the offence defined by our statute, with the distinctions here drawn and the reasons upon which they are based, must convince the court that no accessories are contemplated by our law, whether the nature of the felony be regarded, or simply the provisions and terms of the statute. The reason of the *first* distinction, as given by Blackstone, is evidently inapplicable here. The charge of "aiding or assisting" the escape, *be the manner what it may*, constituting, by the statute, the principal crime; there can be no room for a difference such as exists in the example of robbery put in the text. The accused will be fully apprized of the nature and denomination of the crime by the general charge of "aiding and assisting." As to the *second* reason, it is sufficient to observe that our statute defines but *one punishment*. The *third* and *fourth* reasons, are as easily shown to be controlled by the Kentucky law. No lawyer will for an instant contend, that by the terms or reason of this statute, a previous conviction of one of the persons engaged, is at all necessary to a trial of another who may in any manner be implicated; or that after acquittal upon an indictment founded on this law, a man may be again indicted and tried for participation in the same transaction previously inquired into. The idea would be preposterous.

The reasons then upon which the common law distinctions between *princi-*

pals and *accessories* being wholly avoided by our statute, the conclusion follows as a corrollary, that the crime with which the prisoner is charged admits of no *accessaries*, but that all are *principals*. The *reasons* of the distinctions failing, the distinctions themselves cease. There is one crime, one grade of guilt, one trial, one punishment. There is no description of accessorial guilt throughout the statute—not a single feature which points at, or characterizes an accessary. I maintain then, sir, that in the investigation of this subject, and in applying the law which bears upon it, we must look to this characteristic of the statutes, and reject any and every principle based upon a different foundation.

The second ground which I shall occupy is—that a crime must always be punished, where it is consummated, and that the state or country where laws have been violated, are of right entitled to the jurisdiction of the offence. To illustrate this position, it will be advisable to give a condensed history of the change which has been operated in the principles by which the law of *venue* in criminal cases is governed.—Starkie, in a note, vol. 1. p. 5, in treating of the origin of juries, and of the sphere of their jurisdiction, says—"That the modern jury are the same with the *jurata patriæ* of Glanville and Bracton, their name, number and general duty, which to this day is *dicere veritatem*, sufficiently prove, although it is clear that a most important change has taken place as to the manner of exercising their important functions. Even so lately as the reign of Henry III., they exercised a kind of mixed duty, partly as witnesses, partly as judges of the effect of testimony; in the case of a disputed deed, the witnesses were enrolled amongst the jury, and the trial was *per patriam et per testes;* and to so great an extent was their character then of a testimonial nature, that it was doubted whether they were capable of deciding in the case of a crime secretly committed, and where the *patria* could have no actual knowledge of the fact. (Bracton, p. 137.) It was, however, at this period, that the capacity of juries to exercise a far wider and more important function, in judging of the weight of testimony and circumstantial evidence, began to be appreciated, for about this time the trial by ordeal fell into disuse; and when this superstitious invention, the ancient refuge of ignorance, had been rejected as repugnant to the more enlightened notions of the age, it happily became a matter of necessity to substitute a rational mode of enquiry by the aid of reason and experience, for such inefficacious and unrighteous practices.' From this era probably may be dated the commencement of the important changes of the functions of the jury, which afterwards, though perhaps slowly, took place, until they were modelled into the present form." This gradual change in the functions and composition, of juries was accompanied, in criminal cases especially, by a change in the principles of venue and jurisdiction, as radical, if not as important. Here we learn, that *the knowledge of the facts in issue*, determined alike the composition of the jury, and its jurisdiction. The *witnesses* of the transaction were considered as best qualified to act as *jurors*; and this principle located the *venue*, and bound it down to the immediate vicinage of the occurrence. Hence the law of venue resulted, that a crime could only be tried in that neighborhood where all the facts accompanying it, happened. And if a crime commenced in one county, and was consummated in a different one, this restricted, and narrow principle of the

law of that age, forbade its trial in either; because the jury of the county in which the crime commenced was not supposed to be sufficiently cognizant of the facts attending the consummation in the other county, and so of the jury of the county in which it was consummated. To fortify this ground, sir, I read from Chitty's Criminal law, vol. 1. p. 120. "In the earlier period of our history, it was even necessary that the offence should be tried by a jury of the visne or neighborhood, who were then regarded, as more likely to be qualified, to investigate and discover the truth, than persons living at a distance from the scene of the transaction; it being a maxim of the common law, quod ibi semper debet fieri triatio ubi juratores meliorem possunt habere notitiam. The venue was always regarded as a matter of substance, and, therefore, at common law, when the offence was commenced in one county and consummated in another, the venue could be laid in neither, and the offender went altogether unpunished.—Thus, if a mortal blow was given in one county, and the party died in consequence of the blow in another, it was doubted whether the murder could be punished in either, for it was supposed that a jury of the first could not take notice of the death in the second, and a jury of the second could not inquire of the wounding in the first." You see, sir, from these authorities when connected, that the principle of making jurors of witnesses, restricted the venue to very narrow bounds, and that the consequence was a great and ruinous failure of public justice. But the change which Starkie records, from a jury of witnesses to an impartial jury entirely unacquainted with the facts, wrought a mighty change in the law of venue. It removed in a great degree, the necessity of limiting the trial to the place where all the facts were known. And with the process of civilization, the advances in legal science, and the general illumination of the public mind with reference to the grand principles of public policy, another and a sounder principle of jurisdiction was recognized by the courts, more particularly in criminal law. The principle, that the violation of the law gave the true criterion of jurisdiction, and that the place where that violation of law was consummated, was justly entitled to the venue, was fully asserted in England. It is true that this principle, for greater certainty, was frequently declared by statute, yet it had independently of legislation, reached the English bench, and infused its spirit into that enlightened judiciary. This result indeed was a natural and necessary consequence of the change in the constitution of the jury, to which I have alluded. At all events, sir, this principle so gradually operated by the slow progress of liberal sentiments in Great Britain has been abundantly recognized by the Constitution of the United States, and by the most eminent jurists of our land.

Article 3rd, section 2nd, of that instrument, expressly declares that the trial of all crimes, except in cases of impeachment, "shall be held in the state where the said crimes shall have been committed." And Chancellor Kent in the 1st volume of his commentaries, page 37, observes that "the guilty party cannot be tried and punished by any other jurisdiction than the one whose laws have been violated, and therefore, the duty of surrendering him applies as well to the case of the subjects of the state surrendering, as to the case of subjects of the power demanding the fugitive:"—Admitting to its full extent the operation of the

principle I have laid down. England has applied it by statute to the regulation of the jurisdiction of her counties; by adjudication, qualified sometimes by statutory provision to the different members of the British realm; and by construction of international law, to foreign countries. The United States has incorporated it in her national charter, and has embalmed it as one of the sacred elementary principles of the Constitution.

This exposition of the law of venue, places the question of jurisdiction in the present case, in its true light. If the crime charged has been consummated in Kentucky, if the laws of Kentucky have been violated, the result is inevitable, that Kentucky is of right entitled to jurisdiction. The crime is created altogether by Kentucky legislation. Whoever *in any manner*, "aid or assists" the escape of a slave from her borders, is guilty by the intent and terms of the statute.—Be his participation as limited as it may, still his crime is complete and perfect. No man can "aid or assist" the escape, without being guilty under the statute. He is guilty in no other place or state, than in Kentucky. There alone the crime exists, there alone can he violate the law. Kentucky can only legislate for herself, and her statutes are only co-extensive with her own limits. Hence there can be no portion of the crime of abducting slaves, perpetrated in a different state. The conclusion follows, that whenever aid or assistance is given to a slave to escape from Kentucky, it is a violation of the laws of this state, the crime has been committed here, and here must be the jurisdiction.

Let us apply these principles to the present case. A slave has escaped from his lawful owner in Kentucky, to the state of Ohio. It is in proof, that he was aided to escape. The prisoner at the bar, sir, has been charged with a participation in the aid rendered. The proof shows his participation. A crime has therefore been committed, according to the definition of the statute, and the guilt has been fastened upon the accused. Where has he committed that crime? It could only be committed in *K*entucky, yet has he committed it.—What law has he violated? Not the law of Ohio, for there is no law in that state, at all applicable to the circumstances. It is the law of *K*entucky, that has been violated, and to that law, sir, must he account.

But at this stage of the argument, we are met by the question—can a man actually being in one state commit a crime in another? I answer broadly and unqualifiedly, that he can. The anti-revolutionary statute law, and the course of judicial decision upon the common law, of Great Britain, together with the laws of our country, fully sustain the assertion. It is indeed but in strict accordance with the fundamental principle which has been established, not only by the authorities which I have cited, but by the host of reporters and elementary writers to which the gentlemen in thedefence have directed the attention of the court. I refer to the principle that requires that the crime must be punished where it is committed. Take one instance, sir. A man standing on the Ohio shore, fires across the river, and kills a man on the Kentucky side. The crime is not committed in Ohio, where the discharge takes place, but in *K*entucky, where the ball takes effect—where the death happens—where the crime is consummated. The laws of Ohio cannot punish him, because the laws have not been violated.—But he is triable where the crime is committed—he is subject to the jurisdiction

of Kentucky, where soil was desecrated, where laws were infringed. But I shall not allow this argument of mine to rest upon its own strength. I will give you examples from the books. In Chitty's Criminal Law, vol. 1. p. 191, it is laid down as the law that "if a loaded pistol be fired from the land which kills a man at sea, the offender must be tried by the Admiralty jurisdiction; for the crime is committed where the death happens, and not where the cause of death arises." This, your honor will perceive, is a case precisely analogous to the one I had supposed, and it furnishes conclusive proof that *actual personal presence* is not requisite to give jurisdiction; it is sufficient if the crime be consummated within the jurisdiction.

I am aware however, that it will be objected by the counsel of the defence, that the law which I have just read, and the cases immediately following in the connection, apply only to *Counties*, and places exclusively, and completely within the ordinary operation and jurisdiction of the English law. A close examination will expose the utter fallacy of this objection. The authorities are certainly abundant to show, that the inconvenient narrowness of jurisdiction, consequent upon the testimonial character of juries which has been already discussed, applied only to Counties. Chitty in his Criminal Law, vol. 1. p. 186. declares "that at common law, no offence committed on the high seas or beyond the realm could be inquired of, except within the Kingdom."—Again, page 188, "it appears that, at common law, treason, in adhering to the King's enemies abroad, (i. e. as he himself explains, *beyond the seas*,) might be tried where the offender had lands in England." By the *common law*, then sir, offences against the laws of England, although committed byond the seas and in distant countries, were nevertheless punishable by the laws that had been violated, and were held to be within the jurisdiction of England. This exhibits another cardinal and mighty principle in the composition of the common law. *It is the doctrine of necessity.* That this is the foundation upon which the great extension of the law which I have just read is based, is most manifest. Public policy, the great and pervading principles of international law declared the necessity, and the common law applied and enfocred it. I fall back upon authorities to sustain this position. Foster, page 349, speaking of principals in the 2nd degree, holds this language. "He must be present at the perpetration, otherwise he can be no more than an accessary before the fact; except in some special cases *founded in necessity and political justice*, I mean that justice which is due to the public, *ne maleficia remaneant impunita.*

If A. had prepared poison, and delivered it to D. to be administered to B. as a medicine, and D. accordingly in the absence of A., had administered it, not knowing that it was poison, and B. had died of it, A. would have been a principal in the murder, *upon the same foot of necessity*; for D. being innocent, A. must have gone wholly unpunished, if he could not have been considered as a principal. But if D. had known of the poison as well as A. did, he would have been a principal in the murder, and A. if absent, an accessary before the fact; for the *rule of necessity* already mentioned doth not here take place."

Here then is found an explanation for the anomaly in the old England law, that although a crime was committed within the realm, yet if it was not wholly

enacted in a single county, it could not be punished; whereas if a crime was begun and finished entirely without the realm, still it could be tried within the Kingdom. The inconsistency was caused by the two principles I have attempted to develop. The first relating to the venue in counties being determined by the peculiar testimonial character of juries; the second being the doctrine of necessity, founded in public international policy, and governing the venue of crimes beyond the realm. They were antagonizing principles, it is true, yet being limited to distinct spheres, they were prevented from coming in conflict. But they were both pushed too far. They both went to extremes. The first suffered criminals who had offended against the laws of England to escape; the second punished, many who were not properly amenable to those laws. But as soon as the principle was established, that the country whose laws were violated, and in which the crime was consummated, was entitled to jurisdiction; the excesses produced by the two principles I have been considering were corrected. This great principle, the result of increased intelligence, modified and controlled the others. It enlarged the first, by granting the jurisdiction to the county where the crime had been committed; and *restricted* the second so far as to allow jurisdiction of foreign offences only, a portion of which had been committed *within* the realm. It reconciled these two features of the law, and made them strictly consistent with each other, and with the broad dictates of justice. That the change actually took place in the jurisdiction of counties, I have already amply shown; the change with regard to foreign offences can be readily placed beyond dispute. Chitty in the 1. vol. 90th page of his Criminal Law, says "though the Court of King's Bench has no jurisdiction over offences committed abroad, unless under some particular legislative provision; yet if any part of the offence be committed in Middlesex, where the court sits, it may inquire of the whole transaction." Again, page 193. "And in general, where a statute creates a new felony or offence, consisting partly of an act within the Kingdom, and partly of one without, and limits it to be tried where the offence is committed, it must be tried where that part of the offence is committed which is within the Kingdom." See also 1. Espinasse's Reports, page 62. This state of the law, compared with the ancient construction of the common law which I have previously quoted, develops clearly a great and fundamental change in the principles and extent of jurisdiction.

The jurisdiction over offences committed in different counties, and in different countries, resting then at the present day, upon the same principle, all the cases respecting the jurisdiction of counties, as well as those relating to distinct Kingdoms, are properly by applicable to, and illustrative of the case before the court.

But, sir, the cases in the books are not confined to such as involve merely the jurisdiction of adjacent counties; they reach the question of jurisdiction where a portion of the offence is committed beyond the seas. I refer you to 1. Espinasse's Reports, p. 62. The case there reported, arose upon a charge, that the accused, living at Antigua in the West Indies, "had purchased in England certain stores of Whitehead and Co. at a certain nominal price agreed upon between them, which price he charged to Government on his returns to the Navy office; and that by collusion between him and Whitehead and Co., the latter had made

to him a considerable allowance in such nominal price; which allowance he reserved to his own use; by which Government was defrauded to a large amount." The evidence showed that the defendant had not been in England during the transaction charged. The plea was to the jurisdiction. Lord Kenyon, in delivering the opinion of the court, observed that as the several false charges by which, Government was defrauded, had been in the several returns made by him from Antigua, to the Navy Office in London; that thereby an offence was committed in London, which had been complete by the returns having been allowed, upon which the jurisdiction of the court attached. He further observed that had the criminal matter arisen wholly abroad, the plea to the jurisdiction would have been sustained. Here, sir, is a crime committed by a person thousands of miles distant from the shores of that country which claimed and exercised jurisdiction of his case, and which actually passed judgment upon his guilt. The question then, whether a man being personally present in one state, can commit a crime in another, I conceive to have been fully and satisfactorily answered.

But it may be asked—does the principle first established apply to cases where the crime has been perpetrated by an agent? Sir, it would be difficult, I apprehend, to define a distinction founded in reason between the two cases. *Qui facit per alium, facit per se*, is an adage of universal acceptance in legal construction. Its wisdom is unassailable.—He who contrives and darkly schemes, yet strikes by the hand of another, does not thereby rid himself of the smallest portion of that burden of guilt which is fixed upon him. But this question must be settled by authority and precedent, not simply by argument. Chitty, in the 1. vol. of his Criminal Law, page 191, states that "if a shot be fired in one county, or provision administered, which becomes fatal in another, the venue must be laid in the latter; but it would be otherwise if A. in one county, should procure B. a guilty agent, to commit a murder in the second, because in that case A. would be an accessary before the fact, and triable as such in the county where he was guily of the murderous contrivance. On the other hand, if a person, unconscious of the guilty design, as a child without discretion, be employed in the commission of a murder, the venue must be laid in the county where the death happens, for they are merely the instruments, and the contriver is the principal." Again, same page—"Where a person by means of an innocent agent procures a felony to be done in another county, he may be indicted there, though not personally present, thus in case of a threatening letter, sent by the hands of a person ignorant of its contents, the defendant may be indicted in the place where the letter was received."

Here it is plainly and palpably laid down, that a person in one county procuring a crime to be done in another *by an innocent agent*, is indictable and punishable in the county where the crime was committed. But the English law, draws a distinction between the procurement of a crime by an *innocent* agent, and the procurement of a crime by a *guilty* agent. In the one case the procurer is punishable where the crime was committed, in the second case, he is punishable where the crime was contrived. The same sentence, however, which declares this difference of jurisdiction, gives the reason which created it. The reason is, that where the procurer acts by a guilty agent, he is made by the law an

accessary, whereas the agent being guilty and actually perpetrating the deed, becomes the principal in the crime. The principal in this case, that is the agent, is triable in the county where the crime is completed, by the force of general principle of law already discussed. The accessary, that is the procurer, is triable in the county where he contrived by virtue of the statute 2 & 3, Edward 6, ch. 24. which declares that accessaries shall be tried "where their particular criminality existed." Had the procurer, who acts by a guilty agent, been considered as a principal by the English laws, it is evident that the jurisdiction would have been different. But that law distinguishes between the act of the agent, and the contrivance of the procurer. And whether the act and contrivance, occur in the same county, or not, it gives a separate trial—assigns a different character, and often a different grade of guilt—awards frequently a distinct punishment and requires that the principal shall be tried before the accessary. Regarding them as two distinct crimes and separate transactions, the English law considers that there is not a sufficient priority or connection between the procurer and agent, to blend the two offences into one, and make thereby the place of actual commission the common venue. But whenever a statute abolishes the distinctions as to guilt, trial, punishment, &c. and raises both procurer and agent to the consequence of principals, then the effect upon the venue is removed, and the jurisdiction over both procurer and agent, attaches to the place where the act itself is committed; because the general principle of the laws then applies, that the offence is punishable where it is consummated.—Again, we find that the reason given by Chitty, goes still further, and takes the ground that the accessary is not triable where the crime was consummated, *because he is triable elsewhere*, that is, in the county where he contrived. The inference is powerful, that if he was not triable in the county where he contrived, the law of the *necessity of the case* would have reached him, and rendered him triable in that county where the crime was committed. For, although the rude interpretation and application of the common law, previous to the days of Edward 6., would have suffered a crime under such circumstances to have gone unpunished in either county, yet such a crying evil would not be tolerated by the enlightened expounders of the common law at the present day. The principle which has since been recognized, that punishment attaches to the jurisdiction where the crime has been consummated, would govern and fully control such a case.

Let us turn now, Sir, to our own statute upon which this trial is had. That statute *creates* the crime charged upon the prisoner. It is a new offence in the criminal code. By the terms and intention of the statute, as well as by the nature of the crime, it has been shown that all who are guilty and chargeable under the statute, are *principals*—that no *accessaries* as are defined by the English law, were contemplated or created. The distinction then, which obtained in the common law of England, between the cases where an *innocent* agent was employed, and where a *guilty* agent was employed in the perpetration of crime, has been virtually abolished by our statute. For that distinction depended upon a distinction between *principal* and *accessorial* guilt, which is not recognized by the Kentucky statute. We are then fully authorized in applying the doctrine of agency generally to the crime before us, and in stating the law which governs

this case to be, that where a person, by agent either guilty or innocent, procures the abduction of a slave from this state, though he never was personally in the State, yet is he indictable and punishable in the state where the crime is committed; that is in Kentucky. The result is the same, if we apply the second principle which was noticed in the cases from Chitty: that the crime was punishable in the county where it was contrived, because it was not triable elsewhere. In the present case, the crime exists only by the statute of Kentucky, and is punishable only by the courts of Kentucky. The crime does not exist in Ohio, nor, as a consequence, is it punishable there. The crime would go unpunished, were it not punished in Kentucky. The doctrine of the necessity of the case, as modifying and enforcing the law of agency, is then fully applicable. Is not the argument complete, Sir?

But to prove beyond the power of cavil, that the procurer of a crime is always punishable where it is consummated, provided the distinction between principals and accessaries does not operate, and provided also that the crime is not punishable elsewhere, I will refer the Court to a case fully illustrating this principle. I read from 1 Chitty's Crim. Law, p. 191, "If a person *in Ireland* procures another to publisha libel *at Westminster*, he may be indicted *in Middlesex.*" This principle, Sir, is founded upon the case of the *King vs. Robert Johnson*, as reported in 6 East. 583—602, and 7 East. 65. Johnson was an Irish Judge, who had, as it appeared in evidence, written a libel in Ireland, and enclosed it to William Cobbett in London, with a request of publication. Cobbett complied, and published the libel in his Weekly Register. The plea to the jurisdiction was expressly made and overruled, and Johnson was found guilty. In this case, Cobbett, the agent, could not have been innocent; he was privy to the contents of the libel and to its publication; and was of necessity implicated in the guilt. Here then, was a procurer acting through a guilty agent. The distinction between a principal and accessary is not here recognized, because in the case of libel, the procurer, writer and publisher, are all regarded by the law as the "*makers of the libel.*" See 1 Russel, p. 206. The principle, too, that the punishment must attach to the place of the consummation, was here applied, giving jurisdiction to the English, instead of the Irish Court. This case then is precisely in point with the one before the court, with this exception, that *there* the crime could have been punished elsewhere; *here* it cannot be. We have then the additional ground of the necessity of the case, upon which to base the jurisdiction we claim. It was there decided that such a ground was unnecessary to give the right; though the case would have been much stronger and clearer in favor of the claim of jurisdiction. In the case of the prisoner at the bar, we unite all the principles upon which jurisdiction in the event of agency can be founded. The crime is consummated in Kentucky; it is procured through the intervention of a hireling agent; the law creating the crime recognizes no accessories, but deems all participating *principals;* and the offence is known only to the laws of Kentucky, and is not punishable elsewhere. A combination, sir, embracing all the elements which have been laid down by the English books, as conferring jurisdiction; and presenting a case, in point of strength, emergency and public policy, for transcending all contained in the long catalogue of British authorities.

By pushing our investigation farther, and inquiring into the reasons of the law of procurement, as we have found it to be, they will be discovered to resolve themselves into three fundamental and elementary precepts of the common law. The absent procurer is always punishable where the crime is consummated—

1st. When altho' absent, he is near enough to the scene of perpetration to render *personal* assistance if necessary.

2nd. When from the *nature af the crime* he is, in contemplation of law, necessarily present.

3rd. Where he is by the terms of the law a principal.—The two first principles are expressly and universally recognized by the books. Foster lays down the doctrine broadly, as based on the authority of Hale, and the numerous cases which are there given in support of it. Chief Justice Marshall, in 2. Burr's Trial, p. 426-7-8, comments fully upon those authorities and confirms their position. His conclusion is, that to render a *procurer* constructively present, "he must be ready to render assistance to those who are committing that particular fact, and to give immediate and direct assistance," *unless* it result from the *nature* of the crime, that all who are concerned in it are legally present at every overt act." This, I conceive, establishes the two first propositions. If the *nature* of the crime is such that all concerned in it are legally present, then the distance of the procurer from the scene of commission is immaterial. He may be 100 *yards*, or 100 *miles* distant. It is not in such case necessary that he should be near enough to render personal assistance. But if his legal presence do not result from the nature of the crime, then his proximity must be such as to ensure his ability of rendering assistance.—These two principles, it will be observed, *apply only where the law admits of accessaries.* For the whole object of this fiction of constructive presence, is to bring the procurer within the definition of a *principal.* Where all are principals by law, the doctrine of constructive presence is unnecessary, and of course is inapplicable.

It is not my intention to contend, sir, that the first principle as stated is appropriate to this cause. It is conceded, and the evidence is conclusive, that the prisoner was not sufficiently near to render personal assistance. Nor, sir, will I press the position, that he is to be considered in law as present, as a necessary result from the nature of the crime;—though upon that branch of the question *much may be said.* But I shall rely upon the *third* principle laid down, that a procurer is always punishable where the crime is consummated, *whenever by the law creating the offence, he is made a principal in the crime. That* is the position which above all others sanctions the justice of this prosecution. It is *that* which seals and rivets the jurisdiction of your honor. I have already attempted to prove to the court, and I trust successfully, that by the statute of Kentucky creating this offence, and upon which this indictment is based, all who in any wise participate, are considered and punished as principals. If this third principle then be true, its application to the prisoner at the bar is unquestionable, and the conclusion is overpowering that he is properly within your jurisdiction, and justly punishable by the laws of Kentucky.

To be entirely convinced of the truth of this third principle, your honor has but to revert to the case already cited. It is expressly asserted as the ground of

jurisdiction in some of those examples; in others it is deducible. Chitty, 1 vol. Crim. Law, p. 191, in stating the difference of venue in the two cases where a procurer acted through an *innocent* agent and when he acted through a *guilty* agent, gives as a reason why he who acted by a guilty agent is not punishable where the crime is consummated, that the procurer in that case "would be an *accessary before the fact*, and triable as such in the county where he was guilty of the murderous contrivance." On the contrary, he says that where a procurer acts through an innocent agent, he, the procurer, must be tried "in the county where the death happens," *because* in that case, "the contriver is the *principal*." A clear and unqualified recognition of the general doctrine, that when the participator in a crime is a principal by the requisitions of the law, he must be tried and punished where the crime is consummated. This is the ground, sir, of the jurisdiction exercised in the case of the libel by the Irish judge as reported in 7 East. 65; for he regards the procurer, writer and publisher of a libel, as equally makers of the libel, and of course *principals*. The same principle determined the case of the Navy agent at Antigua, as reported in 1 Espinasse. 62. And more than this, it is a ground expressly assumed and urged by Chief Justice Marshall in 2 Burr's Trial, p. 426. He is discussing this very point.—"But," says he, "that a man may be legally absent, who has counselled or procured a treasonable act, is proved by all those books which treat upon the subject; and which concur in declaring that such a person is a principal traitor, not because he was legally present, *but because in treason all are principals*. Lord Coke says, "if many conspire to levy war, and some of them do levy the same according to the conspiracy, this is high treason in all." Why? Because all were legally present when the war was levied? No.—"For, in treason," continues Lord Coke, "*all be principals*; and war is levied." This doctrine of Lord Coke has been adopted by all subsequent writers; and it is generally laid down in the English books, that whatever will make a man an accessary in felony will make him a principal in treason." So says C. J. Marshall. This principle taken in connexion with the fact, that in England, a principal traitor was always triable in the county where the overt act, which he either procured or committed, was consummated, amounts to a decisive declaration that a traitor, either by *procurement* or by *actual commission*, was triable where the treason was committed, *because* he was made by the law *a principal*.—The principle that "whatever will make a man an accessary in felony will make him a principal in treason," is applicable to the case under discussion; because by our statute, whatever will make a man an accessary in other felonies, will make him a principal in the crime of abduction. The cases are precisely analogous, and the illustration is complete.

The cases of Ballman and Swartwont, and of Aaron Burr, have been alluded to by your honor, as decisive of the principle that the place of the commitment of the crime must be the place of trial. They do establish that principle broadly. But they establish nothing at war with the principles I have here advocated. They however have been relied upon by the defence as showing that the jurisdiction of Kentucky does not attack in the present case. I shall therefore briefly examine the principles upon which those cases turned.

The treason of levying war, was the crime charged in both circumstances. By

the English law, such treason was committed whenever an assemblage in force took place with traitorous purposes. And whoever counselled or procured such treason, was guilty as a principal traitor. The federal court in the cases referred to, affirmed this definition of the treason of levying war, but left undetermined the question, whether the *procurement* of treason in this country, was treason or a high misdemeanor under our constitution. The Chief Justice, in delivering the opinion of the court, expressly reserved the decision of that question, as being entirely unnecessary in the determination of the points then before him. In the case of Ballman and Swartwout, there was no evidence whatever of treason. Traitorous *plans* were partially, but very imperfectly in evidence; but *no act, no assemblage*, was proved. The court were of opinion that neither treason nor a high misdemeanor were sufficiently proved, as having been committed either within the jurisdiction of that court, or beyond it. They were consequently discharged without being held to trial either at Washington City, or elsewhere. There was certainly no point of jurisdiction decided in that case. Burr's trial was upon different grounds. There had been an assemblage at Blannerhassett's Island, within the State of Virginia, which was charged as traitorous and warlike. Burr was admitted to have been in the State of Ohio at the time of the assemblage, yet was charged with having *procured* it. By the laws of England, had the treasonable *act* been proved, and had his *procurement* of that particular act been likewise in evidence, he would certainly have been liable to conviction within the jurisdiction where the *act* was committed.—The question was as to the modification the English principle had undergone, by virtue of the two features in our constitution, requiring an overt act to be proved, and the trial to be had in the state or district where it should occur. The court decided, that even admitting that there might still be treason in the United States by procurement, which point was unnecessary then to be determined, yet by operation of the article of the Constitution requiring an overt act to be proved, *that the procurement would become the distinct overt act required*, and which should be alone laid in the indictment, and proved by two witnesses. The *procurement*, then, becoming the overt act required by the Constitution, it was necessary that the trial should take place in that State where the overt act, that is, the procurement which connected the accused with the treason and made him a traitor, occurred. It is true that the particular *act* of treason which had been procured, was necessary to be given in evidence, but only for the purpose of proving that treason had actually been committed, and of shewing the connection of the procurement with that treason. The principal act of treason was not to be laid in the indictment as the overt act upon which the accused was to be convicted; but the *procurement* was to be laid as the overt act required by the constitution. Burr not being present at the assemblage at Blannerhassett's Island, which was the only overt act laid in the indictment, of course he could not be tried under that indictment in Virginia. If he was guilty of treason at all, he was guilty and punishable in that state where the overt act, that is the procurement, transpired. The procurement did not take place in Virginia; it took place in Ohio. Accordingly he was committed for trial in the State of Ohio.—On that trial it would have been

necessary to determine the question which had been left undecided, viz: Whether treason in the United States can be committed by procurement.

Such were the principles decided upon Burr's trial. Do they affect the question of jurisdiction before this court? I conceive not, sir. Had the English law been uncontrolled by our constitution, the procurer of treason would have been punished where the principal act of treason had been committed. Precisely the principle we contend for here.—But the constitution, by its requisition of proof of an overt act, coupled with the further provision that the trial must be had where that act was commttted, so qualified the effect of the English doctrine as to make the procurer triable only where he procured. In the case before us there is no overt act required to be proved, and the English law is left in its full force. This is distinctly the difference between the two cases, and instead of militating against the principles of this prosecution, it is conclusively in their favor.

I come now to the last view I shall take of this subject.—The jurisdiction claimed by the prosecution, results not only from the well authenticated principles of the English common law, but has been expressly asserted by the statute law of our own state. A short survey of the legislation upon this subject will be sufficient.

The 2d section of the 4th Article of the Constitution of the United States gives the right of demand for all fugitives from justice. The law of Congress of 1793 enacted that an indictment or affidavit properly authenticated should be sufficient to authorize the demand and delivery. The statute of Kentucky of 1815 further required that the delivery should not take place, 'till the person demanded was properly identified before a circuit judge to whom the warrant of apprehension issued to the sheriff, should be returned. The statute of Kentucky of 1820 still further modified the right of demand. It provides, that where runaway slaves shall have taken protection in another State, "and the owner or owners of such slave or slaves, *by themselves, their agent, or any other person with their approbation*, shall have removed such slaves from the State to which they had fled, and he, she, or they shall have been indicted for the same in that State," that the duty of the circuit judge before whom the person demanded may be brought, shall be to enquire into the fact whether he is the owner, or agent of the owner, or one acting with the approbation of the owner; if such be found to be the case, the circuit judge is directed to release him, and the Governor is bound to refuse the demand. But if it be found on that inquiry, that the person demanded is neither the owner of the slave, nor the agent of the owner, nor one acting under the owner's approbation, the law says that the judge is to order him into custody, for the purpose of being surrendered to the demand upon the appearance of the agent of the State demanding him. This statute is intended to embrace *all cases* where runaway slaves have been removed from another State into this State. The law necessarily applies as well to persons who have removed such slaves, or caused the removal, *having no color of claim* as to *owners*, or the *agents of owners*, who have rescued such slaves. To illustrate this point. Ohio has a law making the removal of a colored person from her limits, without proof of property before a judicial tribunal, a felony. Suppose that a colored person is removed from that State without the necessary

proof. A man in Kentucky is indicted for it by a grand jury in Ohio. The demand is made of the Governor of Kentucky by the Executive of Ohio. The warrant issues, and the person demanded is brought before the circuit judge. By the law of 1815, the prisoner has a right to introduce proof that he is not the person demanded; and if such proof is furnished, the judge is bound to discharge him. By the law of 1820, the prisoner has the further right of introducing proof that he is the owner of the slave, or that he is the agent of the owner, or that he acted with the approbation of the owner. If either of the alternatives be proven, the judge must discharge him. But the prisoner has not the right of introducing proof *on any other point*, nor has the judge the right of investigating further. Suppose, then, that the person demanded has *failed* in his proof touching identity, ownership and agency; I ask your honor, whether the judge is not bound to commit him, and the Governor of Kentucky bound to deliver him up to the demand? Sir, it connot be doubted. He has been demanded "as a fugitive from justice," upon an indictment duly certified, he is the person demanded, and he is neither the owner nor the agent of the owner, nor one who acted with the approbtion of the owner. All the conditions of the law are fully met, yet hehas removed the slave, "by himself, (to use the terms of the statute) or by his agent, or by one acting with his approbation." He is then clearly liable to the demand. The judge has no right to inquire into the *manner* by which that guilt has been incurred, whether in person or by agent. That portion of the inquiry is properly, *necessarily* left to the tribunals of Ohio.

This statute, it is conceived, bears directly upon the question before the court. Its object was plainly to protect the slaveholders of Kentucky, and to throw an additional safeguard against the negro property of Kentucky. It did this by extending, as I have said, the field of inquiry of the circuit judge. The inference is powerful, that the legislature carried this principle of protection to its farthest possible extent. Yet they have not protected a person, who, tho' in Kentucky, yet procures the removal of a slave from another State by agent. This case is not embraced by the statute, and, of course, is not within its protection. It would have been easy for the legislature to have given this protection, by allowing the circuit judge to inquire whether the person demanded had personally been within the borders of the State demanding him. But they have not done so. On the contrary, the statute declares that whoever, by himself or *by agent*, &c., removes the slave, shall be subject to the demand, provided he is not the owner or agent. Kentucky, then, by this statute, clearly admits the right of Ohio to demand such person, and acknowledges that she has no right to refuse the demand. But in admitting the right of Ohio to put such person upon his trial, she irretrievably concedes the *right of conviction*; for from the object and spirit of the statute, it is plain she claimed every point she deemed herself entitled to claim, and has only conceded what she was forced to concede. If she had not deemed a person, who by agent, but without the right of ownership, had rescued a fugitive slave from Ohio, justly guilty, and justly liable to punishment, she would have protected him, declared him not amenable to the laws of Ohio, and directed her circuit judge to discharge him.

Kentucky, by the act of legislation, having admitted the right of Ohio to pu-

nish those, who, though personally present in Kentucky, yet procured a crime to be committed against the laws of Ohio, has adopted the very principle upon which this prosecution rests. And what she concedes to her sister States, as necessary for the maintenance of their laws and domestic policy, she likewise claims for herself.—She deals equal justice, and will not arrogate to her own laws, what she refuses to others. But when she declares a principle in favor of other States, she appropriates it also to herself. Thus we find that in the subsequent statute of 1830, upon the same subject, she distinctly asserts the jurisdiction which in the act of 1820 she had conceded to her neighbors. And the two statutes are mutually explanatory of each other. The act of Kentucky of 1820, acknowledges the jurisdiction of other States over her own citizens, or those within her limits, whenever they shall have illegally removed runaway slaves from those States, either by "themselves, their *agents*, &c.—provided they be not the owners or agents of the owners of such slaves; and the act of 1830 claims jurisdiction for Kentucky over the citizens of other States or those within their limits, who have "*in any manner* aided or assisted" the escape of slaves from their owners in Kentucky. The term "in any manner," used in the latter statute, is in part explained by the statute of 1820, as meaning "by themselves, their *agents*," &c; but is a term which is in fact even more comprehensive and universal in its application, than the terms employed in the statute of 1820.—Thus, Sir, do the two statutes explain each other, and thus do they assert the same grand principle of international law.

This right of jurisdiction which has been thus asserted by Kentucky, we have seen recognized by the ablest expounders of the English law, as a well established feature in that code of enlightened jurisprudence. And, Sir, this principle is in perfect accordance with the spirit and peculiar character of our institutions. Our national Constitution was adopted upon the broad grounds of mutual concession, conciliation, and compromise. The peculiar usages and institutions of the different members of the confederacy were fully recognized and respected. Especially was the right of slavery amply acknowledged and jealously guarded in the charter of our national compact. And to enforce and render effective these salutary reservations, "to the general government," in the language of a distinguished expounder of the Constitution, "were assigned all those powers which relate to the common interests of all the states, as comprising one confederated nation; while to each state was reserved all those powers, which may affect, or promote its own domestic interests, its peace, its prosperity, its policy, and its local institutions." Story's Commentaries abridged, p. 514. Slavery being a domestic interest and a local institution of the most delicate and sensitive nature, which had been studiously respected by the Constitution; it was left completely and exclusively within the guardianship of the states individually. With regard to that subject, they were left by the Constitution as distinct and independant nations. The law of nationsis consequently fairly applicable. I shall content myself with a single reference. I quote from Vattel, chap. 5, p. 220. "Justice," he remarks, "is the basis of all society, the sure bond of all commerce. Human society, far from being an intercourse of assistance and good offices, would be no longer any thing but a vast scene of robbery, if no respect was paid to this

virtue, which secures every one in the possession of his property. It is more necessary still between nations, than between individuals; because injustice has more terrible consequences in the quarrels of these powerful bodies politic, and it is more difficult to obtain redress. The obligation imposed on all men to be just, is easily shown to be a law of nature: we suppose it here to be sufficiently known, and content ourselves with observing, that natiens are not only obliged to perform it, but that it is still more sacred with respect to them, from the importance of its consequences."

Here, Sir, is distinctly asserted that cardinal principle in the social system, upon which Kentucky has founded her legislation in regard to the question of jurisdiction before us. It is the undeniable right of all nations to protect their citizens in the possession and full enjoyment of their property. Here is an impressive picture too, of the fearful consequences which would result, should this principle not be respected. In the impressive language of Vattel, human society would become "a vast scene of robbery." There would be an entire disruption of the beautiful fabric of the social system. All its fair proportions would tumble into fragments, and the genius of anarchy would hover in hideous mockery over the ruins. Sir, should it be decided that this Court has no jurisdiction of this crime; should Kentucky law be found to be unequal to the protection of the rights and property of Kentucky citizens; should this dark and dangerous league against our enjoyment of property sacredly secured to us by the Constitution of the United States, be pronounced beyond the avenging reach of our law; I ask you, Sir, what is that Constitution worth? What are our laws worth? What is our boasted liberty, but another and more seductive title for legalized licentiousness and chartered anarchy? Sir, the consequences of such a decision are fearful in prospect; they will be frightful in reality. Such a principle will sooner or later, burst the bands which bind in beautiful sisterhood, the different members of our confederacy; and will strike *a mortal blow* into the very vitals of our republic. Sir, I have done; the decision of the question is with you; the consequences of that decision with time alone.

Speech of Thomas Y. Payne.

Mr. Payne said, the arguments of the gentlemen who have preceded me, have left me but little to say in the conclusion of this debate on the part of the prosecution. The question involved in this issue, has been so fully discussed, and so ably met, that I would be willing here to rest the argument, but for the position I occupy as the officer designated by the law, to prosecute this case, and also in consequence of the matters which have transpired in it personal to myself. It has been remarked by one of the gentlemen who defend the prisoner, that to him it was a matter of astonishment how the prosecuting attorney can reconcile it to himself to press the conviction of the prisoner. The other has chosen to observe that if it was his fortune to represent Ohio, as I now do Kentucky, that it would afford him infinite pleasure to dismiss the indictment, and he would

not hesitate to do so, for want of jurisdiction in the Court to try the offance, if it was a Kentucky citizen arraigned before an Ohio tribunal. If the remarks of the gentlemen were intended to instruct me in my duty, I can only thank the gentlemen for their friendly solicitude and advice. If they were intended to deter me from a conscientious discharge of my duty, in the prosecution of the prisoner, the gentlemen have failed in their object. For unawed by what the gentlemen may say, and not intimidated by the consequences that may grow out of a strict discharge of my professional duty, I shall with whatever of powers (small though they be,) with which nature has endowed me, advance to this subject and give the Court the result of my most conscientious and solicitous investigation, to fully understand this important case. In arriving at this conclusion, my mind was left free to act uninfluenced by any considerations of interest. For it is no portion of the policy of the Commonwealth to convict the innocent. I am only placed here to prosecute, not to persecute. It is also the more important that I should give the Court my views of the law touching this case, in justice to the gentlemen who have been associated with me in this prosecution. But, Sir, in giving you the conclusion to which my mind has arrived after an anxious investigation given to this subject, I hope neither the Court nor jury will suffer any opinions of mine to have any effect upon the conclusions to which they may arrive, except so far as these opinions may be sanctioned by the law;—as it has been, and as I may read it to your Honor. Indeed, I should hesitate in expressing an opinion at all, but from the indirect insinuations of gentlemen, that I must be pressing this prosecution against my own deliberate convictions. Sir, in this the gentlemen are mistaken; for never did I press an indictment with a more thorough conviction, that I was enforcing the law, and nothing but the law, than I do upon this occasion.

In arriving to the conclusion that the Court has jurisdiction to try this prisoner, (and from the motions now made that is the only debateable question,) I am not singular. I do not stand alone; I am cheered on, Sir, in the discharge of my duty, by the consciousness that those who stand around me, the fathers of the land, approve what I am doing. I am cheered on, Sir, by the consciousness that amongst those too, is one upon whom we have all looked as the father of our profession in this county; whose patriotism is as pure as the driven snow, and upon whose advice in the hour of difficulty and of danger, I would rely as fully as I would upon that of any person on earth, and whose high attainments, legal acquirements, and correct moral bearing entitle him to the consideration in which I hold him,—one, coincides with me in opinion as to the jurisdiction of this Court. Sir, I am confident your Honor cannot misunderstand me as to whom I mean. There certainly are not two persons in the county who could sit to this picture I have drawn. Then, Sir, sustained as I am by my own thorough convictions, —sustained as I am by the moral sense of the community, I cannot, I will not hesitate. Pardon me, Sir, in having said thus much in repelling the imputation on the part of gentlemen, that I was pressing the conviction of the prisoner with great zeal, against my own convictions of its propriety and legality.

The gentleman, Mr. Vaughan in defence, has also said that he considers me as occupying a false position in pressing this prosecution. Sir, I admit, in one

sense, I am in a false position, but not in the one alluded to by the gentleman. If the gentleman had said, that by the effort now made by himself and colleagues in defence, in endeavoring to withdraw both the law and the fact from the jury, and inducing the Court to decide both of them, and in thus bringing up the question by way of motion, he had placed me in a false position, then I would have agreed with the gentleman. Sir, I am in a false position, having the affirmative in this case to support, and yet having no right to reply to the arguments of the gentleman who is to follow me. I venture to assert that such a spectacle has never been presented, since this old and venerable pile in which we now stand, was first erected. Certain I am, that during the time I have stood at this bar, nor for the last fifteen years, I have never yet seen the prosecuting attorney, having the whole burthen of the affirmative to support,—placed in the position I now occupy; having to be followed by the gentleman in reply. In that sense, I am in a false position.

Much has been said by the gentlemen, as to the impolicy of convicting the prisoner at the bar. They have urged that Ohio makes common cause with him, and the gentleman from Ohio has observed that Ohio would conceive herself insulted by his conviction; and that if Kentucky should claim jurisdiction to punish this man under these circumstances, it would be establishing a principle against which Ohio would war. Sir, I am at a loss how to express myself, in reply to remarks such as these, coming from that gentleman. In what attitude does the prisoner stand, under the motion made by the gentleman in this case? He stands in this attitude—that admitting the truth of the facts proved against him, and also admitting every fact that could be reasonably and legally deduced from these facts, by the jury--yet his counsel contend that the Court has not jurisdiction. I contend that the jury might reasonably and legally find, from the facts proved, that the prisoner at the bar, he being in the State of Ohio, did by his agents in this county, Kentucky, aid and assist the slave named in the indictment, to escape from his master in this State, to the State of Ohio, and from thence to Canada. In placing the argument upon this footing, I go no farther than the gentleman, Mr. Chambers, who has preceded me has gone. For he has contended for the prisoner, that admitting all this as true, the prisoner has committed no crime towards Kentucky for which he can be punished in the county of Mason. Sir, does he reflect in what attitude he places the State of Ohio, when he says that Ohio makes common cause with such a man. That Ohio would conceive herself insulted at his conviction; that his conviction would establish a principle against which Ohio would war, in bloody and desperate strife. Who is it and how is he engaged for whom Ohio would draw the sword and imbrue it to the hilt in the blood of her brethren? One who, leagued with others, in defiance of the Constitution of his country,—in disregard of every moral principle which binds every honest, upright and patriotic man to sustain that sacred charter of our liberties inviolate, have conspired together to wrest by fraud, force or other means, a large portion of the wealth of the citizens of Kentucky, in violation of the rights secured to them in that charter of our confederation, which alone secures to us the enjoyment of life, liberty, and property.—One, who thus leagued with others, and for the unholy purpose just

stated, in defiance of those obligations which should arrest them in their mad career, and in utter disregard of the consequences which must result from their unprincipled conduct, have associated themselves together, and now hang like a dark and threatening cloud, upon our northern boundary. One who, admitting the facts as proved against him in this case as true, and which upon this motion the gentlemen are bound to admit, sits there a felon by our laws, and a fit inmate for our penitentiary. Is such a man, and his deeds, such as Ohio would make common cause with? Sir, on the part of Ohio, I protest against it. Such men, and such deeds form no part of the fair fame of the State of Ohio. He is an alien in the land of his adoption. He sits like a disgusting boil, upon the body politic of that mighty and growing State. I cannot be persuaded that Ohio would be proud of the character the gentleman has given her. I cannot be persuaded that Ohio would appropriate the acts of the prisoner to herself, and make them a portion of her general character, or common wealth. Can it be said that Ohio would take part with the writer of this disgusting and celebrated midnight letter that I now hold in my hand? Can it be said that Ohio takes part with those, who at midnight, at that lone and still hour when all whose hearts are honest, are either in commmunion with their God, or else buried in repose with their families,—steal abroad, and by themselves or their agents, or their unaccountable minions, pilfer and filch from their neighbors their property, which they obtained by the sweat of their brow, and which is secured to them by the same sacred instrument as secures to every citizen the quiet of his own hearth? Can it be said that Ohio would resent as an insult, the punishment of one of those conspirators who leagued together for the purposes before enumerated, have thus become traitors to the peace and well being of the community, and traitors to the Constitution of their country, and have taken to themselves the unholy maxim, in the accomplishment of their unhallowed purposes—"peaceably if we can, forcibly if we must." For let it be remembered, that the witness in speaking of the conduct of the prisoner, on that memorable midnight occasion when this letter was written, appeared not as a peaceable citizen, but came to the appointment armed with his rifle, prepared to enforce his object and to resist all who might attempt to impede him in the accomplishment of his wishes, This circumstance, insignificant in itself, when taken separately and disconnected from all else, speaks volumes to the minds of those who read in it the deep and abiding determination of all those who have embarked in this stupendous project.—Stupendous from the great and alarming effects that are to be produced; stupendous, from the deep and damning infamy which much attach to those who would thus ignite the match, which shall fire a mine which will destroy a prospect, the fairest upon which the eye of the philosopher, the philanthropist, the patriot, or the statesman, ever rested. I speak of the dissolution of this Union, which must follow, if those leagued with the prisoner are not arrested in their mad career.

I cannot believe, I will not believe that Ohio will make the cause of such a man her own, with due deference to the gentleman's superior opportunities of knowing the Ohio character and Ohio feeling. I cannot think that Ohio would war for such a man, committing such acts. Let me not be understood, Sir, as urging the conviction of this man without the law shall say he is guilty. I ad-

vocate no such doctrine; I express no such principles. But what I urge is this, that there is nothing in the character of the prisoner—nothing in his pursuits, nothing in the acts charged upon him, and those proved in this case, nothing in his relative situation in regard to our sister State, that should prevent us from bringing to this discussion our most calm and deliberate judgment, binding to it our most anxious and deliberate attention, giving to it the most vigilant investigation; and if after this examination the Court and jury should come to the conclusion, that the prisoner is guilty under the laws, as the same has been handed to us by our forefathers—we should not be deterred from asserting the majesty of the law, pronouncing him guilty, and meting to him the punishment that the law has awarded to his crime—uninfluenced by any fear of the vindictive feelings of the citizens of Ohio. We should do our duty to ourselves and to our country, and if, contrary to every estimate that I have formed of the character of Ohio and of her citizens, she should, in the language of the gentleman, make the prisoner's cause her own, and in defence of him and his principles, she should draw the sword and throw abroad her banners—Kentucky, the injured party, conscious of the justice of her cause, will have to abide the result. If the gentleman should have been prophetic, and if that dread hour shall ever arrive, which Heaven avert! Kentucky will not prove recreant to her fair fame, nor to her sacred honor. She will teach the proud State of Ohio, as in former days she beat back the common foe from the borders of Ohio, in defence of Ohio and of Ohio property—so she can in like manner beat back Ohio herself, when she would act as the oppressor. But arguments like these when driven to such extremes, are least of all adapted to calm deliberation, and I regretted the remarks of the gentleman as being ill-timed and injudicious—not calculated to heal the wounds under which Kentuckians are now smarting; not calculated to allay the silent but fearful heavings of the troubled waters in which she is now moving. But, Sir, the excuse for such remarks may well be found in the excitement of the moment, or the heat of debate. And no doubt before I finish, I shall have need of the same lenity I now freely extend to the gentleman, when I concede that the goodness of his heart, and correctness of his principles, would not permit him to make such an exercise of power on the part of Kentucky, a cause of war with her sister State.

Having thus disposed of the matters which run with me preliminary to the argument of the legal question presented to the Court, I will with permission of the Court now present to it, in as condensed a manner as I am master of, the reasons that have impressed my mind why the Court should not give the instructions demanded by the gentleman in the defence of the prisoner. In urging my objections to the instructions, I shall attempt to maintain the following positions:—

1. The instructions should not be given to the jury, because the jury are the triers of the law and the fact, in criminal cases.

2. If the Court should conceive they have the right to instruct the jury, then the instructions should not be given, because the evidence does sustain the charge laid in the indictment.

In support of the second proposition, I shall maintain the following positions:

1. That the crime laid in the indictment, has been committed in Mason county, Kentucky, by the abduction of a negro boy slave, John, the property of Wm. Greathouse, and the crime was completed in the county of Mason, Kentucky.

2. That the prisoner at the bar did commit the crime in Mason county, Kentucky, by his agents employed for that purpose, he, the prisoner, being at that time in Ohio.

3. Those two propositions being sustained, I contend the venue is well laid in Mason county, and there the prisoner must answer to the charge; he being by the law constructively present.

In support of which proposition last stated, I shall maintain the following positions.

1. By the terms of the statute under which this prosecution is carried on, all are principals who are in any manner connected with it; there can be no accessaries.

2. Should the Court believe there can be accessaries to the offence created by this statute; then I shall contend that, provided the Court should determine that the offence committed by the prisoner was his being accessary before the fact, to the commission of the offence, then by operation of law the prisoner is made a principal in the offence. Because he was in Ohio where there was no punishment for the crime of being accessary before the fact, to the commission of the offence, and unless the law makes him a principal, he will go unpunished.

3. If by the terms of the statute, or by operation of law the prisoner is made a principal in the commission of the offence in Mason county, Kentucky, then the jurisdiction attaches to the county where the offence is committed; the prisoner is legally triable here, although he was in Ohio when the offence was perpetrated.

4. That by the common law, the offence must be tried and the venue laid in the county where the offence was committed, or the crime perpetrated; and where a portion of the crime was committed, or perpetrated in a county, there the Court may take jurisdiction of the whole offence, whenever otherwise the criminal would go unpunished.

The first proposition that the Jury are the triers of both law and fact, is one that is recognized by the Constitution of our own State—see Constitution of Kentucky, page 71. There it is affirmed, "That in prosecution for libels the Jury shall have a right to determine the law and the facts, under the direction of the Court, as in other cases." The question, then, presents itself, How did the Jury in other cases determine the law and the fact under the direction of the Court; or in other words, in what manner and to what extent have the Court a right to instruct the Jury in other cases. By a reference to Blackstone's Commentaries, 4 vol. 361, this question will be solved. "When the evidence on both sides is closed, the Jury cannot be discharged till they have given their verdict. And such verdict may be either general, guilty or not guilty, or special setting forth the circumstances of the case, and praying the Judgment of the Court, whether for instance, it be murder, manslaughter, or no crime at all. This is when the Jury doubt the matter of law, and choose to leave it to the Court, though they have an unquestionable right of determining upon all the circumstan-

ces and finding a general verdict." Thus it will be seen in those other cases referred to by the Constitution, the Jury had the right to determine both the law and the fact, and the Court had no right to control the Jury or determine the law, unless the Jury should ask the aid of the Court, when they doubt as to the law.

The right of trial by Jury, the privilege that each citizen enjoys under our Constitution, of being tried by twelve impartial men, his peers, of his own selection, is one that is dear to the bosom of every freeman. It is a privilege that recommends itself to all, whether humble or exalted. In it they each hold one of the strongest bulwarks of their liberty, and their independence, their boast in the hour of safety, their protection in the hour of danger. It is one of those hallowed principles that have been handed down to them by their forefathers—to which they cling with filial affection, and with which they would part only in the last extremity. In no country and in no land is this privilege prized more highly than by Kentuckians. And was any dreadful visitation to overtake them, by which this valued Constitution was to be torn from them, article by article, to this one would they cling; and the effort that would rend this one from them, must be equal to "the last expiring effort of animated nature."

The evidence in this case has gone to the Jury, they have it. They have a right to judge of it. It reached them without objection from the gentlemen, (at least the objection that was made was withdrawn,) and now the jury have the evidence, they have a right to judge of it. It cannot now be arrested from them. They have a right to judge of it, and apply the law to it, and to find their verdict upon the evidence and the law; and if the Jury doubt the law, they have a right to call to their aid the Court, otherwise the Court have not a right to interfere. 'Tis true, there is a point, should it arrive, at which, the gentleman would have a right to ask your honor to pass upon the matters involved in those instructions. But that point is in arrest of judgment, should a verdict be found.

It is not, sir, for want of confidence in the Court, that I make this objection. It is not from any situation that your honor is placed in, with regard to this particular prosecution, that I urge it. It is not in consequence of any particular principles promulgated by your honor in your late charge to the Grand Jury, which I have seen commented upon in the morning papers, erroneously, I think, that I would urge your honor to abstain from interfering with that, which I conceive to be the province of Jury. For I am now free to declare, that there is not a legal principle therein laid down, not a sentiment advanced in that charge to the Grand Jury but merits my most hearty and cordial approbation. But it is for the principle that would be established. It is for the effect that establishing such a principle may have upon us, and upon our children. For when once the sacred right of trial by Jury is interfered with, when once the barrier that is thrown around it is overleaped, who shall stay the wasting process by which it will be undermined. So far as I am myself concerned, I would be willing that your honor should take this entire case into your own hands and determine it, but for the principle that would thus be established, not supported by the practice of the Courts, and unsustained by my authority.

It is urged in argument, that a similar motion was made in the case of Aaron Burr, before Chief Justice Marshall, and sustained by that Court. I do not so

understand the motion that was made in that case. By referring to 1st volume Burr's trial, page ——. In Mr. Wickam's opening speech, also, 2 vol. Burr's trial, page 445, it will be seen the motion that was then made was not in the nature of a demurrer to evidence, nor a motion to reject the evidence that had been given. But the motion was made and entertained by the Court, to reject illegal testimony that was offered, in consequence of its illegality and irrelevency. Such a motion I would admit would be legal. Such a motion the gentleman once made in this cause, and afterwards withdrew it. But, sir, when in the heat of argument, the learned Counsel, Mr. Martin, in the case alluded to, was urging upon the Court their right, or their power to entertain the motion made before them, and in debate passed the argument to the extent for which the gentleman contended in this case, he was stopped by the Chief Justice himself, and asked if a criminal Court had ever sustained such a proposition. See 2 vol. Burr's trial page 352. The Counsel after the elaborate examination which his efforts show he had given that case, was forced to admit, that the authorities were against him. I challenge the gentleman engaged in this defence, for the production of a single case in which the motion of the gentlemen was entertained by the Court; and I would call upon the Court to pause before they entered upon a path upon which no foot print can be seen. I would call upon the Court, most of all in a case like this, where so much of interest is hanging upon it, not to leave the safe and beaten way.

Here I am persuaded I could with safety rest this argument, and reserve that which I may have to say touching the law and the fact to the Jury. But looking to the fact that in this opinion I may be overruled by the Court, I shall proceed to urge the reasons why the motion of the gentleman should not prevail: Because the evidence *does sustain* the charge laid in the indictment. The evidence proves without a doubt, that on the 29th June, William Greathouse was in the possession of the slave John, in the county of Mason, Kentucky, that he was here and upon his farm in this county, and but a few miles distant from the house in which this Court is now sitting; he was a noble boy, worth some 700 or $800. The next morning he was gone from him, and is not again heard of until it is proved in this cause the same boy is at the house of the prisoner, some 30 or 40 miles distant in the State of Ohio, from whence he was sent by the aid and assistance of the prisoner and escaped into Canada. The evidence proves that there was but a short period intervened between the day the boy was missing from the house of Mr. Greathouse, before it is proved by the admission of the prisoner he was in his house in Ohio, and from thence sent by prisoner's means to Canada. The evidence proves that the prisoner said there was a chain extending from Kentucky to Canada, of which he formed a part, by which the slaves were enabled to escape to Canada, that the friends in Kentucky sent them to him, and he sent them on to others, and they on to Canada. The prisoner further stated that fifteen had passed through his hands in a month, two of which were Greathouse's, and one of Greathouse's was named John. The prisoner also wanted to employ witness to become one of the links in this chain, and offered to pay witness for all the slaves he would send on to him; upon the witness hesitating, the prisoner observed that there was a yellow Barber in

Maysville who sent him him all he could. From these facts I contend the Jury have a right, if they should upon their oaths so believe, to find that the boy John, the slave of Greathouse, *was aided and assisted,* in escaping from his master in this county, to the State of Ohio, by the friends of the prisoner in Kentucky who were employed to send on slaves to the prisoner, as he wished to employ the witness to send them on to him. And the motion new made to your honor admits the evidence as true, and also admits every legal and rational deduction that the Jury could draw from the evidence. Then I need not further labor this position of the subject. But your honor must receive for granted, (and it is upon that ground the gentlemen have placed this question,) that the crime was committed in the county of Mason, and that the offence was full and complete, and that it was procured to be done by the prisoner at the bar through the instrumentality of his agents employed for that purpose, he being in Ohio at the time of its commission; he, the prisoner, receiving and sending on the slave abducted. Those positions cannot be disputed upon this motion. If disputed ot all, it must be upon a question of fact before the Jury.

The next subject of consideration is, the effect that such a state of the case will produce against the prisoner at the bar. To ascertain this we must first turn to the statute under which this indictment was found, and this prosecution attempted to be sustained. The Court will find it 2 vol. Digest Laws of Kentucky, page 1302. It has already been read to the Court. By the terms of this statute, all who *in any manner* aid and assist a slave in escaping from his master, are guilty of the offence, and punished as principals. Can a man by the terms of this statute, be an accessary before the fact, to the commission of the offence? Is not an accessary before the fact, in *no way* concerned in the commission of the offence? Foster, Hale, and Hawkins say, that an accessary before the fact, is *quodam modo,* guilty of the offence themselves. In other words, that the accessary is in that manner guilty of the offence themselves. This principle is recognized by Chief Justice Marshall, in the case of Burr, 2 vol. Burr's trial, page 435. By the terms of the statute, *all who in any manner aid and assist* in the commission of the offence, are punished as principals; they do *in that manner* aid and assist the commission of the offence, they are *concerned* in its perpetration, and are embraced and made *principals* by the statute.

The legal effect that I draw from establishing this position is this, that the party must be indicted in the county where the offence was committed, when the party is a *principal* in the offence, and not in the county where he may be at the time of its commission. In Chitty's Criminal Law, 1st vol. page 129, it is given us as the common law, "If a pistol loaded be fired from the land, which kills a man at sea, the offender must be tried by the Admiralty Jurisdiction; for the crime is committed where the death happens, and not where the cause of death arises." The same author same page says, "If a shot be fired in one county which becomes fatal in another, the venue must be laid in the latter county." Again, the same author same page says, "If a person unconscious of the guilty design, as a child without discretion, be employed in the commission of a murder, the venue must be laid in the county where the death happens, for

they are merely the instruments, and the *contriver* is the *principal.*" Those principles laid down by Chitty, fully establish the proposition that whenever the party is by operation of law made a principal in the offence, the jurisdiction attaches to the county in which the offence or crime has been committed, and that the venue must there be laid, and not in the county where the person is who contrives the offence. Apply it to this case. By the law all are made principals in this offence. The crime was committed in the county of Mason and State of Kentucky. The jurisdiction attaches there, to try the offender, although at the time of the commission of the crime he may be in another county, or in another State. But it may be said that although this principle may be correct as relates to the venue, when the party may be in another county from that where the offence is consummated, yet in regard to States, it is not analogous, or its application would not be correct. This objection may be removed by a refer-to the authorities. Chitty's Criminal law, 1 vol. page 129. "If a person in Ireland procures another to publish a libel at Westminster, he may be indicted in Middlesex." "And when a person by means of an innocent agent, procures a felony to be done in another *country*, he may be indicted there, although not personally present." Those authorities are in point, and are analogous, considering the Islands of Great Britain and Ireland, as holding towards each other the relations that our States do. The common law doctrine as laid down by Chitty, is sustained by the authorities to which he refers, and are to be found 1st Leach 142, 4th East 171, 6th East 590, 7th East 68, 1st Espinas 63.

But we are not left alone to cases happening in Ireland and Scotland, and the Island of Great Britain, to throw light upon this all important subject. We are not forced to draw the analogy that exist between the different portions of the British Empire to our own, and rely upon that solely as authority here. But we have authority drawn from the reporters of the different States, to show that in the trial of offenders, the States are considered as holding towards each other the same relation that the various counties in one State hold towards each other. In 1st vol. Massachusetts' reports, page 69, Justice Sedgwick says, "The stealing of goods in one State, and conveying the stolen goods into another State, was similar to stealing goods in one county and conveying the stolen goods into another county, which was always holden to be felony in both counties."

Thus it will be seen, that in the trial of offenders for the commission of offences, the States must be understood as holding towards each other the same relation that different counties hold towards each other. And if, as I have contended under this branch of the subject, by the terms of the statute, under which this prosecution is had, all are principals, and none are accessaries, then the conclusion to which I come is irresistible, that all being principals in the offence, the jurisdiction attaches to the county where the offence was committed; and the jurisdiction does not attach, nor should the venue be laid, in the county or State where the offender actually is at the time of the perpetration of the offence, in which he is a principal, which crime is fully consummated in a different county, than that in which the offender of the law is, at the time. But should the Court conclude that by the terms of the statute, *all* are not made principals, and there could be such a person as one guilty as accessary before the fact of the crime created by that statute; yet I shall contend, under the circum

stances of this case, by operation of the *common law* all are made *principals.* In support of this position, I shall first show, by the statute laws of Ohio, where the prisoner was upon the day the offence was committed. There is no punishment affixed to the crime of being accessary to the commission of this offence. I know it was contended by the gentleman who preceded me, that the laws of Ohio punished the offender, and there he should be tried and punished, in the county of Brown and State of Ohio. Sir, I hold in my hand, and now present to the gentleman, the revised code of the laws of Ohio, and challenge the gentleman to point me to the statute that punishes the offence of aiding or assisting a slave to escape from his master, in the State of Kentucky. No such statute is within the lids of this book. None such exists. Then, sir, to speak of punishing the prisoner in Ohio, where he was, at the same time he contrived set in motion, and had this crime committed through his instrumentality, is worse than useless. There is no statute punishing the offence. He could not, then be punished. If he is released from this prosecution, he goes free and unpunished, although he has been the prime mover, the instigator, and cause of a grievous wrong to one of the citizens of Kentucky—although he has trodden beneath his feet, and set at defiance her laws, in the property of one of her citizens, yet he goes unpunished.

But I shall attempt to show you there is no such laches in the law. The law does not thus permit the guilty to go unpunished. In Foster, 349, it is held, "The offender must be present at the perpetration of the offence, otherwise he can be no more than accessary, except in some special cases *founded in necessity,* and political justice. I mean that justice which is due to the publick, "*ne malefacia remanet impunita.*" In what cases is it that Foster says it is not absolutely necessary that the offender should be present, yet the law will make him a *principal,* and punish him although not present. It is in those cases, when otherwise the offender would go unpunished. And in illustration of the text upon the same page, he gives us some cases to explain his meaning. "If A had prepared poison and delivered it to D to be administered to B as a medicine, and D accordingly, in absence of A, had administered it, not knowing it was poison, and B died of it; A would have been a *principal* in the murder, *upon the principle of necessity,* for otherwise A must have gone unpunished, if not made a *principal.*" Here we find it expressly recognized, that whenever by making the offender an accessary, he would go unpunished, the law "*ex necessitati,*" by its own operation makes him a principal, that the guilty may meet with his reward. The same principle is recognized in Chitty's Criminal law, page 129. It will be found that the Judges in the United States had also acted upon and carried out this principle of "*Necessity.*" 2 Massachusetts' reports, page 16, it was held by Parker Justice, in the opinion there rendered: he observed, "The point on which the Court refused cognizance of the Pirates case, in 3 Institutes: was that the admiralty having jurisdiction of the offence, there was no danger that the guilty would escape punishment. In the case at the bar, on the contrary if the criminal is discharged *he can be convicted no where.*" And in that case he maintained the jurisdiction of the Court, and the criminal was punished, although not personally present at the commission of the offence. Sir, that is the doctrine of the common law;—that it is so recognized in their elementary writer

and that it is carried out by the Judges in England, in the adjuged cases that are handed down to us, we cannot for a moment doubt. Upon what other principle did the Court in the county of Middlesex maintain jurisdiction in the case of Johnston, the Irish Circuit Judge, reported in 7, vol. East, page 68. In that case Johnston had never been out of Ireland, and by letter or agent he procured the libel, to be published in Cobbet's weekly newspaper in London, yet the jurisdiction was maintained, and the Irish Judge was tried and punished in London, yet he had never been out of Ireland. Under what principle was it that Menton, residing in the Island of Antigua, reported in 1 vol. Espinas, 62 page, was tried in London for an offence committed by him, through the instrumentality of agents, although the prisoner was never out of the Island of Antigua? And yet was he ably defended, for Erskine and Garrow appeared in his defence, and raised the question of venue, and plead to the jurisdiction of the Court. Yet the Court retained jurisdiction. Upon what principle was it that Girdwood was tried in Middlesex, for an offence committed in Middlesex; when he, Girdwood, at the time of its commission was in another county, as reported in 1 vol. Leach, page 142? Upon the principle that they, in each of those cases were made *principals* in the offence, and upon no other principle could they have there been tried. Upon what ground were they principals? Upon no other ground than that given to us by Foster and Chitty. The principle of *necessity*. Make them an accessary before the fact and they would go unpunished. And why? because by the common law the accessary before the fact could not be punished until after the conviction of the principal. In all those cases the principals could not be punished because they were innocent agents, who were used to effect the object, and conviction could not be had; and the contriver, the instigator, the accessary before the fact, would go unpunished, unless by the operation of the law they were made *principals*.

Apply this principle to the case now under consideration; make the prisoner at the bar an accessary before the fact, and he goes unpunished, for two reasons. —First, the *guilty* or *innocent* agent that he employed to do this act, is not known; hence his conviction cannot be had, neither can his name be known so as to charge the prisoner as accessary to his guilt, (his conviction or apprehension being rendered unnecessary by the statute of Kentucky.) 2d, Make him an accessary, and the statute of Kentucky requires him to be tried in the county where he feloniously contrived and procured the commission of the offence. Now, in the county of Brown and State of Ohio, where the prisoner contrived and procured the commission of the offence, there is no punishment for his criminal contrivance, or for the offence of being accessary to the commission of the crime, and hence he, the prisoner, must go unpunished. For those reasons, and that the guilty might not go unpunished, by operation of law the prisoner is made a *principal* in the offence.

Then if I have established to the satisfaction of the Court, that the offence has been committed within the county of Mason, and that the prisoner is rendered a *principal* in that offence, either by the terms of the statute creating the offence, or by the operation of law, *ex necessitate*, to promote the ends of public justice, it will require no effort to show the Court that the jurisdiction attached

to try the offender in the county where the offence was committed, and that the venue was properly laid in the county of Mason.

That the venue should be laid in the county where the offence is actually committed, when the party is a *principal*, and not in the county where the party actually is at the time he commits the offence, is proved by every authority that has been read, either by the prosecution or those in defence; and Hale, Hawkins, Foster, and Chitty, have all been read to prove this principle, but each party making a different application of the same principle. Hence, the cases that have been cited to prove this principle, come from both parties, and cannot be controverted. It is sustained and illustrated by cases too much in point, and too strong to be easily shaken. Such for instance, as when a party fires a gun from the land, and the shot takes effect and kills one on a vessel at sea, the venue should be laid in the Admiralty Court, for there the jurisdiction attaches; as also if one at sea fires a gun and the shot takes effect and kills a man on the land, in one of the counties of England, the venue should be laid in the county where the death occured, for there the jurisdiction attaches; as also if one being in Ireland, by means of an innocent agent, administers poison to a man in one of the counties of England, and the man dies, the venue should be laid in the county of England where the man died; for there the jurisdiction attaches to try the offence: as also, if one being in Scotland wites a libel, and sends it to London, and procures it there to be published, the venue should be laid in Middlesex; for there the jurisdiction attaches to try the offender.

How then are the gentlemen in defence to escape the conclusion—the prisoner at the bar is either a *principal* in the offence, or an *accessary befoae the fact*, to the commission of the offence. Which is he? Is he an accessary? That presupposes a principal. Then, *who* is the principal? Is not an accessary before the fact, by the terms of the statute made a *principal?* If gentlemen answer, no, and contend that under this statute there can be offenders as accessary before the fact, distinct from the *principals*—then, I ask them, if by the operation of law, the accessary, under the circumstances of this case, is not made a *principal* in the offence; otherwise, I ask them, how can the prisoner at the bar, admitted to be an accessary to the crime, be punished? Would he not go entirely unpunished, if considered an accessary, and not a principal?

The gentlemen cannot escape; they will have to run counter to the authorities, as laid down by the elementary writers upon the common law of England, from the time of Matthew Hale down to the present, to serve their client. Either the common law of England is not the rule to guide us here, although it has been solemnly recognized and enacted as the law of this State by the legislatures of Kentucky and Virginia, the State from which we sprung—or else the principles for which we have contended are the law of the land, and must control this case.

But the gentlemen contend that the cases on which we rely, as sustaining the elementary principals, as contained in Chitty and Foster, are post-revolutionary cases, and of course are not authority here. I admit, that a portion of the cases we have read, are such as described by the gentlemen; some of them are anti-revolutionary. But were they all such as the gentlemen designate, yet would I contend that the highest tribunal in our State, the Court of Appeals quote them, and give them as authority illustrative of the principles of the common law. I

refer them to the 4th volume of Dana's Reports, pages 11 & 364, in which the Court has quoted a host of these cases, as illustrative of the principles of the common law. But, were the principles as given to us by the elementary writers, such authors as Hale, Foster, and Chitty, unsupported by a single case by way of reference, their names would be a warranty to us, that the principles which they have given us, are the true principles of the common law, founded upon the common sense of mankind, and tested by the experience of ages—and they would not the less be regarded, because of the want of cases to sustain them.

But we have been told by the gentlemen who opened this debate on the part of the prisoner, that they cared not, what might be the authorities adduced from the elementary writers upon the common law of England; they cared not in what numbers we multiplied them, showing the right of the Court to take jurisdiction of this case,—with them it would weigh nothing. And why? Because they contend that this case has already been decided, and the action of the Supreme Court of the United States has already been had upon this question, when directly presented to them, and they point us to the case of Aaron Burr, in which chief Justice Marshall himself presided; when they contend, that that illustrious Judge has decided the question against us in this prosecution. I am free to admit, that the authority of that name bears great weight with me; that when he has brought his clear and discriminating mind, to the illustration of any principle, he has left for those who follow him, nothing, save to admire the justness of his perceptions, the demonstrative certainty of his conclusions, and the overpowering march of his mind.—But I contend that the reliance that the gentlemen have placed upon that case, will not sustain them in the hour they will most need. First, I contend that the question that is here raised, was not decided in that case. But if it was, I contend that the authority of that case should not weigh here, because the laws that are in force here, and must control in this trial, were not in force and had no weight in the trial of Aaron Burr. It will be recollected by the Court, that the trial of Aaron Burr was for high treason against the United States, under the Constitution of the United States and the Acts of Congress. Let it be remembered by the Court also, that Congress had never recognized or adopted the common law of England, and that the United States as a Federal Government, had no common law. Then the law under which we rely for the conviction of this prisoner, the common law, and the doctrine of constructive presence that is taught by the common law, and which we have arrayed against the prisoner in this case, was not recognized as the rule of action, or the law, by that Court that tried Aaron Burr. Hence, I say that the case is not one, even if the principle was decided in that case, which would be analogous to the one now under consideration, and would not be authority to govern the Court in this cause. The Court will discern, by referring to the 1st vol. Burr's Trial, p. 547, that it is there expressly stated in argument as a fact not debateable, that the United States, as a federal government, had no common law. This point, although one upon which that case ultimately turned, was not disputed by the opposite counsel; and although not expressly decided by the Court, was tacitly admitted. Thus then, the rampart of defence which the gentlemen with such confidence raised, and behind which they entrenched

themselves with such apparent hope of safety—crumbles at the first touch, and will not bear the most cursory examination.

But it has been urged, that under the indictment which has been found by the Grand Jury, one containing a general limit, charging the prisoner with the commission of the offence generally, in the words in which in which it has been created by the statute, that the prisoner cannot be convicted; although the Court may believe that the prisoner, either by the statute or by operation of law, is made a *principal.* For they contend that the nature of the proof against the prisoner, being accessorial, the indictment should have truly alleged the fact as it transpired, and as it is proved, although by the operation of law he may thereby be made a *principal*, and made guilty of the offence. Yet they contend that the indictment should have stated the facts as proved; a consultation of authorities will set at rest this . 1 vol. East. 124, 127, "As all accomplices in treason, are principals, as much as those who do the act, there is nothing to remark of difference between them in respect of the indictment."

1st Hale, 238, "Though the receiver of a traitor, knowing it, be a principal traitor, and shall not be said to be an accessary, yet the indictment must be special of the receipt, and not general that he did the thing; which may be otherwise, in case of one that is a procurer, counsellor, or consenter."

1st Hale, 238, "Indictment of receipt must be special, otherwise in case of procurer, or counsellor."

Thus it will be seen, that in treason the accessary before the fact, who by operation of law is made a principal, may be convicted under an indictment charging him generally with the commission of the offence. The case is in point, it is believed. But the ingenious gentlemen who have opened this defence, have contended, and it will no doubt be urged with great effect by the talented gentleman who is to follow me, that even admitting the common law doctrine of constructive presence, and admitting that the common law if enforced, would by operation of law make the prisoner a principal in this crime, and thus attach the jurisdiction to try the offence, to the Court that now has the same under consideration, —yet do they contend that Kentucky, when she adopted the common law, only adopted so much thereof as was not in opposition to the laws of Kentucky, and as was not repugnant to the Constitution and the pure institutions of our country. They further contend, that the adoption of the principles for which we contend, would be at war with the principles of our government, and at war with the principles of state rights as recognized by the resolutions of Kentucky in 1798. To this we reply, that the principles for which we contend, are not new; they are as old as the principles of the common law, and have stood the test of "scrutiny of talents and of time." They are not novel in this country, for they have been recognized from one extreme of the continent to the other. We find Justices Parker and Sedgewick enforcing them in Massachusetts, and we find Livingston incorporating them into the code of Louisiana; and that too, to an extent greater than they have been pressed in the prosecution of this case against the prisoner at the bar. They are not at war with the institutions of our common country; or why do we see the sons of the puritans in Massachusetts, that free and happy people in whose bosoms the torch of liberty first blazed and

burned, enforcing them; or why do we see the chivalry of the South adopting them, prompted by Livingston, than whom a purer patriot never lived, and whose varied acquirements, exalted talents and stupendous legal attainments, have shed a lustre upon the American bar. They cannot be at war with the institutions of our country nor with our principles of state rights, because of the beneficent effects their adoption will produce upon the well being of our confederated republic. Turn this prisoner loose and let him go at large, averring the participation that he has had in this transaction, and yet from the impotency of our laws let him go unpunished, and who shall say what will be the effects that it will produce? Will it not embolden the confederates of this prisoner, who already hang upon our Northern border like a dark and threatening thunder-cloud, surcharged with an element which bodes more of evil to us than the whirlwind's fury, or the electric-shock.—Will it not embolden *them* to greater daring and to darker deeds? Sir, it will require no soothsayer to foretell in what it will ultimately end. It will end in that catastrophe, to which Vattel in his Law of Nations, says all communities in which such principles do not prevail, tend—"in bloodshed, anarchy, and ruin."

Sir, can it be expected, will it be permitted, that the abolitionists may ever rob us, and that Kentuckians will ever bear, when there is no law to protect and no law to punish? Is there no fear that they may bear until there is no virtue in forbearance? This is not the picture of a heated imagination. Every mail—nay, every wind that comes to us, brings us the evidence of our danger, and our helplessness. Even now I had placed in my hands, by a gentleman, the Warsaw Gazette, a paper published in a little village a few counties below us, containing an account of the detection of a conspiracy of the abolitionists of Ohio, to rob them of their slaves in that neighborhood, (here Mr. Payne read the paragraph from the Warsaw Gazette.) So it will be seen that stern, undoubted facts press themselves home upon us, as to the truth of the evil that exists, and which it is to be hoped, the adoption of the principles for which we contend, may tend to avert. Let it be known, by the determination of this case, that those who aid and assist our slaves to escape from us in Kentucky, either by themselves or agents, are amenable to our laws, and may be punished here, in the county where the offence is committed. Will it not deter persons from the commission of the crime,—will it not give security and permanency to our property, and will it not, far more than all else, tend to lessen the danger that exists, of that fearful collision that must take place between two hostile parties arrayed against each other, the one impelled onward by bigoted fanaticism, the other smarting under a sense of infamy and of wrong, committed by the first, upon his rights and upon his property? If the enforcing of the principles of the common law, as we have contended for them, will tend to lessen the danger of such a catastrophe, then the adoption of them by the legislatures of Kentucky and Virginia was not at war with the institutions of our country, nor with the best interests of society.

I thank the Court for its kind attention, conscious at the same time that the rights of the prisoner at the bar will be protected, the Constitution and laws of our State will be enforced, and the honor of our State, and the well being and happiness of Society, so far as the same is involved in this case, will be safe in its hands. Without recapitulation I will rest the argument.

Speech of John Chambers.

John Chambers said his attention was well nigh worn out—he could also sympathize with the Court, whose patience had been so severely tried. No man could sit and listen for five successive days to discussion, however able and interesting, without being oppressed in mind as well as body—he knew it by experience. He would therefore, in regard for the Court, be as brief as his duty to his client would permit. He knew the Court was anxious that all should be heard; he knew the Court would do justice if the "*Heavens fell.*" He had listened to the speeches of four counsel for the prosecution, which he had never done before: it was permitted by the Court, and he was truly glad. They had treated the case with gravity; and he thought its nature,of all others, required the most serious deliberation. The question involved, was important to Kentucky, to Ohio—to the Union. Abolitionists, he could speak of but with disgust; he knew they were fanatics, and a deluded set of men: though their convictions might be honest, they were all led estray. The prosecutors had said Kentucky was gallant and chivalrous, that her sons would rush to the border strife with alacrity, determined to defend their rights or die. He admitted it, but thought the remarks ill-timed and uncalled for. He and the Court knew well the chivalry of Kentucky; they had watched her almost from her infancy; their blood had been cooled down by age, and they could rightly deliberate on the consequences of war and border strife; they knew that no small thing could drive Kentucky to it. She had her government from such men as never lived before, and mayhap never would again, and he hoped her chivalry would not endanger it gratuitously. If war must come, he prayed to God she would act on the defensive. Kentucky should first admonish them to stay their unholy hand; she should not threaten, but tell them all she asked was a fulfilment of the Federal contract—an obedience to the laws of God. He knew they were deluded, and should be told so. If not deluded, they were knaves. There are men found in this unholy business, destroying the fairest government on earth, some sworn to support it; if patriotism could not bind them to their oath, religion should; they have contracted it through their representatives, and if not bound thus, they should be by morality. He said they were all brothers of the same confederation, and so should act. The peculiar features of the government should tell them to stop. Let her not fall as other republics had *fallen*, when the laughter peal of exulting monarchs was the requiem that sang them to rest. But how long before civil war shall come? If he were permited to judge from the tone of the gentlemen prosecutors, he would say, not long; the scene would soon commence. Such, however, was not his deliberate conviction. If come it must, he trusted in God he would first be in his grave; he would rather leave the world than be a witness to the strife. The people of Ohio are our brothers, their blood has commingled with our own: can a few fanatics drive us to the fight? Those who talk so vauntingly of war, he thought had not felt its pleasures; the attorney for the commonwealth, who had spoken of it so often and loudly, would go to battle with his wonted chivalry; he knew his blows would bedirected with the rest. A government that prated of its chivalry, and sought a warfare when it could be avoided, was unstable, and

its fall sooner or later certain. He acted in other capacities when this question was agitated; had seen excitement in other places, and like the prosecutors, had acted indiscreetly. Free states thought we boasted of our chivalry but to intimidate them, to drive them from their purposes. The present case had created unsual excitement; paragraph after paragraph was elicited from the presses on either side of the Ohio: it had even entered into the spirit of the elections. Mahan was demanded of the Governor of Ohio as a fugitive from justice, he was charged with having committed a crime within the county of Mason—a fact now conceded by all to be untrue. Here was fraud. [Mr. C. here read to the Court the section of the Constitution of the U. S. regulating the demand law.] It was conceded by all, that he did not flee from this state: then how came he here? The Constitution does not recognize the right of one state to extend her jurisdiction over the limits of another state; no man could say it did. Fugitives from justice were otherwise privided for by the demand law. The prisoner is here in fraud of the Constitution of the United States: who is guilty of that fraud? Not Mahan—not Ohio,—it was brought about by the misconception of the Grand Jury; it was a mistake which men not acquainted with law might easily have fallen into. But Mahan *is* here. The opinion is now rife in Ohio that if he was not punished by the laws of the land he would be subjected to summary justice. He would here on behalf the prisoner, acknowledge the courtesy of the officers in whose hands he had been committed—they acted as Kentuckians should and he hoped would ever act. He would assure the citizens of Ohio that this was not the country of mobs and blackguards. 'Twas his boast that the supremacy of the laws had never been interrupted. Kentuckians would not wantonly oppress a man who was unable to help himself. The prisoner himself was convinced of this; he had been treated kindly. There were a class of beings who prowled about with the slaves for whiskey, bread and meat, &c., and rendered them uneasy and excited them to insurrection—they were debased below the character of men—they deserved no man's kindness—they were a nuisance to society. He knew Mahan if acquitted could go his way in peace—he was safe from all but blackguards. No true Kentuckian but would treat him kindly—he trusted he said nothing but met a hearty response in all who heard him.

He was astonished at the numerous authorities the gentlemen had introduced to prove a legal and constitutional right to try him;—he was perhaps bound in courtesy to notice some of them. The crime he was charged with was odious and calculated to alarm the people. The odium of the crime, the alarm of the public mind could not influence him when he knew he was acting in his professional duty. It would subject him to great mortification, if he could for a moment believe the court would not act also, irrespective of the public mind. He was proud to know the court had treated the case with great dignity and attention as much as any Court could have done, and he was delighted to know that Mahan appreciated it. The prisoner hae great faith in Kentncky. He was advocated and defended by Kentucky counsel—was tried by a Kentucky Judge and Jury. It was true, Ohio had her representative here, but he was not here by the procurement of the prisoner. He felt as did his counsel, that idle declamations and

reading newspapers of the most exciting nature, mere questions of abstract news, were not creditable to the administration of justice. The prisoner was not to be thus burthened with the fault of others; he was ashamed that the prosecution would resort to this: the prisoner was as much entitled to protection from the commonwealth as from him, and therefore they should not oppress him unnecessarily. The prosecution have insisted that the jury should be the judge of the law and the facts—and had almost threatened the judge if he wrested it from the jury; they expressed great confidence in the jury as well as the court. He also could trust them. He would like to see the Virginia blood of the court aroused—he knew he was regardless of menaces. He could also trust to the jury, for, with a single exception he had known them from childhood. He was astonished and alarmed at the independence of the prosecutors who had dared to advise the judge to his safest course. Did they mistrust the learning of the court; they protested not:—they conjured up too many alarming topics, too many scarecrows as he knew the termination would prove.

The evidence is insufficient to sustain the indictment, because it charges the prisoner with the commission of a crime within the bounds of the county of Mason. There is no evidence tending to show he had ever been here. This court can have no jurisdiction over a man that was never in the state. The gentlemen have sought to place him in the hands of the jury, that they might convict him by constructive presence; he knew of no such absurdity in the law. Though the statute of 1830, creating this offence had not specified upon its face, who should be principal and who accessary, yet the common law had so defined them in it. We have many statutes creating offences, without specifying the degrees of guilt: it is left to the common law. Will the gentlemen deny there are accessaries to murder?

But gentlemen urge that as the evidence has gone to the jury, it could not be withdrawn from the court, however illegal. Suppose prosecutors had produced evidence that prisoner had stolen a horse, would they deny the right of the judge to instruct the jury to disregard it? Evidence having found its way to the jury, through the neglect of counsel, could always be withdrawn by the judge if illegal. The court would scout at any other idea, for he knew his duty too well. The court was the organ of the law; it had ever been so, both in criminal and civil cases; however gentlemen may draw the distinction, he hoped it would be so here. It was not only the power of the court to give the law, but it was his duty.

Saturday morning. Mr. Chambers resumed. He would hasten to dispose of the preliminary discussion; he wished to progress with the legal grounds the prosecution had spurned with so much ingenuity. State rights was a political name, he had never seen it enter into a legal tribunal before. He was no nullifier, he held no such doctrine: when it was a question as to the sovereign power of a state, he was then a state rights man: each state within its own limits is sovereign and cannot be infringed by another. It is a fundamental principel of political law, and is self evident to all. Kentucky has no jurisdiction in Ohio, though the citizens offend our law. Our courts have so frequently decided. He thought if the counsel for the prosecution stood in his place, they would have the same

opinion as himself, but they were influenced by deliberate conviction. The gentlemen called to their aid the *National Law;* it was foreign to the subject: the constitution of the United States superseded it, and regulated our actions in its stead. It had settled the obligations of states; they were not like nations influenced by the national law. It would be better to let the guilty escape than travel without the pale of the constitution. He was astonished at the use the prosecution had made of the demand law; they had distorted it from its intended operation; he understood it differently. The constitution of the United States provided the demand law, and the legislation of the respective states, could not alter, enlarge, or abridge it.

Blackstone was read by Mr. Chambers, to explain the difference between principal and accessary. They were defined that the accused might know how to defend himself. The venue was a matter of substance; if the prisoner was unacquainted with the venue, how could he properly defend himself? Though the statute of 1830 admits of principal and accessary because not specified upon its face to the contrary, yet this court cannot enquire into the degree of the prisoner's guilt; there was no crime proved to have been committed by the prisoner within the jurisdiction of Kentucky. The counsel wish to bring him here by constructive presence, because of the chain extending from Kentucky to Canada, of which the prisoner is a link. Mr. *Rock* was the only witness that proved that fact; hence he thought the chain was not rightly connected. The false pretences made use of to obtain the confessions of the prisoner, the keeping of the money which he was not entitled to—acting as the tool and catspaw of another, convinced him that he was an interested witness. But what does his evidence amount to? That fifteen negroes had passed through the prisoner's hands within a month—that two of them belonged to Greathouse. It matters not what number passed through, there was no obligation upon prisoner to seize them and send them back. The statute of Ohio read so sneeringly by Mr. Payne, showed that she acknowledged and respected our rights. When that statute passed, matters had not gone so far. Ohio, he trusted, would hereafter provide an exemplary punishment. The evidence did not prove a connection that would make the prisoner guilty here; his confession amounted to nothing more than that "a colored friend sent him all he could; and that there was a line of friends who paid their passage to Canada;" this is all that aided the imagination of Greathouse, in framing the *terrible chain.* There was no ground to believe the chain was formed at the instigation of the prisoner. Admit the honesty of Mr. *Rock*, that he did not filch, from his neighbor, that he was not the catspaw and tool of another man—give his evidence the fullest credence, and there is nothing that will sustain the indictment. The lex loci should alone operate on the prisoner; the *friends*, be they where they may, though guilty and concerned alike, do not make him amenable to any law but his own. Take it for granted, that the Maysville barber was in concert with the prisoner—that he was bound by the prisoner to send all the slaves he could to Ohio; he is not guilty by the common law. The constitution also meets the defence at every point to which they have turned: it provides that in all criminal prosecutions, the accused shall be tried in that state where the crime was committed, by an impartial jury of the vicinage, and shall be informed of the na-

ture of the charge. The prisoner is not in the state where he committed the offence, where witnesses who knew most of all others about his transactions, can be confronted by him.

It is conceded Mahan never had been Kentucky, yet they bring him here by constructive presence. He could not commit an offence without being here against our laws, so as to give us jurisdiction, yet he is to be construed from one spot to another, to suit the prosecution. The defence have urged that a trial should be where the crime was consummated. Was the crime consummated in Kentucky? In the case put by the defence, of a man shooting from the opposite side of the Ohio river, and killing a man in Kentucky; the offence he admitted was consummated in this state and jurisdiction was attached here. The case of the Irish libeller had been frequently alluded to by the prosecution, but he was astonished at the idea they intended to inculcate. The publication was the offence, not the writing; where the publication was made, there the offender was triable, though 100 miles distant. This also applied to the poisoning case; they were as guilty as if they had actually printed the letter, or shovelled down the poison with their own hands; when the offence was committed, then did the jurisdiction attach. There were some authorities he would trouble himself to advert to: 1st, Chitty, as read by the defence, was covered by his preceding grounds: the Constitution was the power to look to. Gentlemen had harped upon the doctrine of necessity and public good. This was the law of tyrants. Foster spoke of no necessity which could possibly arise here. Foster lived in the age of barbarism, and he never laid his hand upon his work without shuddering, but even his principles did not here apply. Gentlemen had wantonly attacked the Constitution; had asked what it would be worth? He answered more than the combined blood in their veins—more than their heads, more than the diadem of kings; it was blasphemy to ask its worth—it had no price. Mr. M'Clung had argued the question with great ingenuity; his failure was also great; he did not argue the guilt of the prisoner, but the possibility of our transgressing our laws without being actually present: he insisted he was here by construction of law, he was not here again by the Constitution: he urged the application of the Irish libeller—the case of poisoning—the West India case also, as reported in Espinasse is cited; the false returns even received in London; the crime was commenced, and consummated within the jurisdiction of the realm; the crime was committed in London, where false returns were received. Thence the jurisdiction attached to London. Taylor's reports declared that the legislature could give no jurisdiction over a crime committed in another state, because of the Constitution of the United States. The opinion of Justice Sedgwick had been introduced, which overleaped the Constitution of the United States; but he would read a decision of the Supreme Court of New York, to answer as a *set-off*.

Saturday evening. Mr. Taylor said, he wished nothing but stern and uncompromising justice, and the protection of the citizens, and property of the citizens of the State of Kentucky. The citizens of Ohio claim the same protection, the same rights, and were equally entitled to the same privileges. They thought their laws sufficient to govern their own citizens, without the intervention of laws not their own. Suppose a citizen of Kentucky had offended the laws of

Ohio, in a similar manner, would the gentleman concede the jurisdiction of Ohio? They were claiming more than they would allow; it was carrying the war into Africa. The same constructive evidence would take the Kentuckian into Ohio.

Taylor had disclaimed that our laws searched into the territory of Ohio; he thought the disclaimer was founded in chicanery and a technical subtlety: the offence was charged against the prisoner, who had not been here for twenty years; he could not understand such a disclaimer. He (Taylor) had quoted the opinion of Tucker to prove that treason could be committed against a state, and supposed an armed force on the oppositite side of the Ohio river, battering down Maysville. This was inapplicable, because they, being citizens of Ohio, owing no allegiance to Kentucky, could therefore commit no traitorous act: our remedy in this case would be resort to arms. He had offered to the jury another suppositious case to excite prejudice. That any citizen of Ohio could excite our slaves to insurrection; that they could write over, and in the very ruins of their guilt, taunt us with being without our jurisdiction, and beyond the reach of our law; he answered they were punishable only by a resort to arms, in the event of a refusal on the part of Ohio to deliver them up to justice. He (Taylor) had quoted Vattel to prove that Governor Marcy was justifiable in surrendering the Bambers. They were discharged under writ of habeas corpus, by the courts of New York, who decided that Governor Marcy had no right to deliver them up; that it was the sole right of the President of the United States, on whom the demand should be made. War had been alluded to by that gentleman, he had spoken of it lightly: it is probable that if war did come, that gentleman himself would be a combatant; he knew he had relations in Ohio, and they might be the first he would meet in a deadly conflict. He begged gentlemen to cease using such language, it was a great incentive to Kentuckians to seek such a strife as their remedy: he hoped they would use no provocations to bring it about prematurely. If it must come, he knew Kentucky would not prove recreant to her best interests; for she had brave sons to defend them. The opinion of Chief Justice Marshall had been frequently alluded to; he knew the court understood it, and he would not read it again, suffice it to say, that on every page of Marshall's opinions he had maintained the right of a trial by jury of the vicinage, where the person of the criminal was guaranteed by the Constitution of the United States; he decided that there was a great difference between the commission of a crime in person and by another, that if an overt act had been proved, the accused was only liable in the state where the act was committed.

The Attorney for the Commonwealth had appealed to the passions of the bystanders, and said, "that he argued nothing for the settled principles of the law;" these remarks however unfounded, were calculated to outrage the rights of the prisoner; no man should thus throw his influence to the jury, it was unjustifiable it was wrong. He had read a Warsaw paper, developing a plot of the abolitionists to run off the negroes in Boone county. For the character of the commonwealth attorney—for the fair name of Kentucky, he hoped those who would report this case would omit to notice this act of the gentleman; it was not creditable to Kentucky jurisprudence; it was an appeal to the judge, who though learned

in the law, was but a man; it was the lot of humanity to shudder at crime, it was possible that its details might excite the passions of every man; none were without its reach. The Court had before alluded to the fevered state of the public mind in a manner creditable to his head and heart. Marshall was denounced by the newspapers in a high state of public excitement, as a conspirator with Burr; his opinions were now approved by incorporation in the jurisprudence of American law; calumny has long since ceased to reach him. The Court is a mere mortal, and should not suffer himself to be thus appealed to. Mr. Payne has declared that the prisoner sat there a felon, this was also wrong; it was as bad as reading the Warsaw paper—it was a work of supererogation—it was injurious to the prisoner; and he was certain that such vehement declarations of the prisoner's guilt would not increase the gentlemen's pleasant reflections. Mr. Payne has complained most bitterly of being placed in a false position; that though attorney for the commonwealth, he had no right to conclude this argument; it was a position he had often occupied when attorney for the commonwealth; it was a position that must occur in all descriptions of cases. He had the affirmative, hence he had the right to conclude the argument. He said that if the evidence was withdrawn from the jury, the Court would establish a dangerous precedent, and strike at the root of a trial by jury. He evidently distrusted the Court. He wished to place the prisoner in the hands of the jury, to operate upon their feelings, and convict the prisoner by illegal evidence. The Court had a right to explain the law; it was his duty, and he hoped he would do it. If the Court had no right to exclude evidence, all romance that found its way to the jury would remain. Mr. Payne asked the Court what attitude he would be placed in if the jury found contrary to his instructions, and he should rise up to maintain it; this was a threat to the Court; he was astonished the Court had permitted it: the gentleman's anxiety to convict the prisoner had led him headlong into a course that he would assuredly regret. Suppose the prisoner was already convicted by the laws of Ohio, under the statute which Mr. Payne had read with such apparent scorn, he could not plead a former conviction, because this Court is not bound to know the transaction of the courts of Ohio, the Court here would not be bound to regard it. The Court had uttered a sentiment that did honor to the magnanimity and dignity of the bench upon which he sat. If he remain true to his country and to himself, he had no fears for the result.

When Mr. Chambers concluded, the Judge said he would deliver his written opinion on Monday morning. Until which time, the Court adjourned.

On Monday morning the Court delivered the following opinion, to wit:

OPINION OF THE COURT.

The deep interest which a crowded house for the last five days bespeaks, has influenced me to give the LAW according to the best of my judgment, in writing,

that it may not be represented or misunderstood. Perhaps no question was ever more ably discussed in this court-house, than the one now under consideration. An array of talent, a degree of eloquence, and a depth of research, highly creditable to the bar, have been displayed, and have aided me in coming to a conclusion, whether just or unjust, this jury, my countrymen, and posterity must determine. It is: that the prisoner has not violated the law of Kentucky, unless "he aided and assisted the slave in making his escape from the owner and possesser *here*, to another state or foreign country," *personally*. The crime must have been committed here, in Kentucky, to give this Court jurisdiction. It is so stated in the indictment, and must be proved as stated. No after act will do. No aid and assistance given *out of this State*, will do, unless he was near enough, at the time the escape was effected, to receive information personally, and aid in case of alarm, by previous arrangement. But if near enough, at the time the escape was effected here, to aid in case of alarm or danger, by agreement, he might be said to *aid* and *assist* the slave to escape from his master in Kentucky, to another state.

I am not impugning the law in force ever since the reign of Edward VI., or the common law, that for *murder*, *arson*, *poisoning*, and other *felonies*, committed here, by one in another county, the offence may not be tried and punished here, and I shall, for the purpose of this opinion, treat adjoining sister states precisely as I would adjoining counties in this State, without any *parade* of learning to prove their independence and sovereignty, except for the purposes mentioned in the Constitution. Am I deciding against any of the common law constructions upon statutes concerning *principal* and *accessary?* What is an *accessary?* Much has been said in argument, and it may not be amiss to answer, that some statutes use the word *accessary* singly, without any other description of the offence. Others have the words abetment, procurement, helping, maintaining, and counselling, or aiders, abettors, procurers, and counsellors. Some statutes describe offences by the words command, counsel, hire. Another calls offenders procurers or accessaries. One having used the words comfort, aid, abet, assist or counsel, hire or command, immediately after, in describing the same offence in another case, uses the words counsel, hire, or command only. One statute calls them counsellors or contrivers of felonies; and many others use the words counsellors, aiders, and abettors. From the different modes of expression, all plainly descriptive of the same offences, I think one may safely conclude, says Mr. Justice Foster, that in the construction of statutes, which oust clergy in the case of accomplices, we are not to be governed by the bare sound, but by the true legal import of the words; and, also, that every person who comes within the description of these statutes, various as they are in point of expression, is, in the judgment of the legislature, an accessary before the fact.

Sir Edward Coke says, that the accessary after the fact, is one who receives a felon knowingly, and conceals his offence, and aids him that he be not known Yet, one who received stolen goods, known to be stolen, from one that had stolen them, was not adjudged a felon, an accessary, unless he also received the thief, before our statute of 19th Dec., 1801.

What shall I make of this in the opinion I am about to render? Why was

so much said about *principal* and *accessary* in argument? and such earnestness displayed in endeavoring to prove that all persons engaged in contributing to the establishment of a chain of posts, or houses of refuge, from this post to Canada, for giving *aid* and *assistance* to slaves, and for the employment of agents here to facilitate their escape from their masters, come within the statute under consideration, and could be tried and punished here, although they never had been within four hundred miles of our border? It was because they were principals or accessaries. It was at all events meeting the question in a proper spirit: and I thank the gentldman for their boldness, for it has produced the most earnest enquiry with me; yet the result is the same that I before expressed, that the person aiding and assisting a slave to escape from his master or owner, to another state or foreign country, must be *personally here*, or near enough to receive information personally, and afford *personal aid* and *assistance* in case of alarm or danger. But if an *accessary*, all admit that he must be tried where he became accessary.

All this doctrine, though it may be applicable to *slave-stealing*, cannot, in the judgment of the Court, be worthy of further consideration in this case. No statute was ever made, or ever will be made, to prevent persons from aiding and assisting property to escape, and therefore we can receive no light from the British courts on the subject of aiding and assisting slaves to escape. For notwithstanding we feel proud of our character as slaveholders, from the humanity and kindness with which we treat our slaves, we nevertheless admit we claim and hold them as property, as goods and chattels.

In slave stealing, or any other kind of larceny, the thief as well as the accessary, is moved and seduced by the love of gain. Can we say this of all whose mistaken zeal has induced them to give their money and means to establish a chain of posts or houses of refuge, from Kentucky to Canada—to send out proclaimers to infuse their doctrines along our frontier—or agents to give information of the ease with which slaves can make their way to Canada? Would we not thereby include many of our best, though I conceive deluded men, from Massachusetts to Mississippi, whose zeal proves the sincerity with which they endeavor to sustain what they believe to be "the holiest cause that tongue or sword of mortal ever lost or gained"—the freedom of all mankind? While I deprecate their course, and fear its consequences, I am not willing to call them felons; but to attribute it to a higher and nobler motive than sordid gain.

I come back to the statue. Have they aided and assisted slaves to escape from their masters here, by the dissemination of their principles and the contributions for the chain of posts for the protection of slaves, reaching from Kentucky to Canada, of all or any slaves their agents may be able to secure or run away from their masters in Kentucky? Will the statute of Kentucky reach them? Are they subject to the criminal law in Kentucky, if never within five hundred miles of its borders? Would the Governor of Kentucky, a distinguished lawyer and statesman, who has worn the judicial robe of the highest court in the land, with honor to himself and his country, have demanded the prisoner of the Governor of Ohio, without the statement upon the records of our court, that the prisoner committed the crime at Mason county, Kentucky—without being satis-

fied that he fled from justice? And would the Governor of Ohio without such statement, have surrendered him? But this by the way; for if the prisoner committed the crime, and is before us by *force*, or happened here by *choice*, we have a right to try him.

Gentlemen argue that, no matter where he lived, if he was one of the conspirators, and did aid and assist even at the distance of four hundred miles from Kentucky—nay, if within the British dominions, and the comity of nations caused him to be surrendered—we have a right to try him. This, however, is not recognized as the law in this case.

The distinction between larceny or stealing of a slave, and aiding or assisting a slave to get away from his master in this state to another, merits further notice. The first is influenced by the basest motives—the other through mistaken philanthropy. The persons engaged in the latter, address themselves to the *passions* and *prejudices*, ah! and *reason* too, of reasonable beings, by writings and by speeches, which however much we may deplore, we cannot punish, unless done within our jurisdiction. Has not the difference between slave stealing or larceny in general, and aiding and assisting slaves to get away from their owners, owing to their intelligence, reason and common sense, never produced doubts upon the minds of gentlemen, whether the law, so much relied upon, is applicable to this case?

It is argued, that because judges *tried* and *imprisoned* juries for finding contrary to their directions, in by-gone days—a practice condemned two hundred years before Blackstone wrote, as tyrannical and contrary to the laws of England—that I dare not now, upon the prisoner's request, signify my opinion of the law, without even touching the facts. I know, as Sir Matthew Hale well observes, it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions: unhappily also for the prisoner, for if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet, he adds, that in many instances, where contrary to evidence, the jury have found the prisoner guilty, their verdict has been mercifully set aside, and a new trial granted by the judge. The practice in both England and the United States imposes upon the judge the duty of declaring the law upon request. It is his peculiar province to decide upon the admissibility of testimony as offered, if objected to—or to exclude it in part or in whole, after being heard by the jury. And because the judge sometimes admits illegal testimony, which produces an effect prejudicial to the prisoner, he sets aside the verdict and grants a new trial. If he errs, it is in the direct discharge of judicial functions, and in nine cases out of ten, on mercy's side. And though no bill of exceptions can avail anything, this jury very well know, and if they do not, I now tell them, that they are judges of the law and facts both, and may disregard this opinion if they choose. Can this be interfering with the ancient mode of trial by jury? Does it not remain sacred and inviolate? But in prosecutions for *libels*—even for libels, the jury should have a right to determine the *law* and the facts, under the direction of the court, as in other cases—yes, *as in other cases;* and the TRUTH may be given in evidence. This produces the change in which we pride. The TRUTH may be given in evidence, and the jury shall not only find *guilty* or *not guilty*,

but shall fix the punishment, by way of damages or imprisonment, for the publication of falsehoods. This is what is meant by their right to determine the *law* and facts, under the direction of the court, as in other cases. The other section cited secures a speedy public trial by an impartial jury of the vicinage; and declares that no person shall be deprived of his life, liberty, or property, unless by the judgment of his peers and the law of the land.

I am among the last that would part with any one of these principles. They are as dear to me as the apple of the eye. But shall I sit here, and for fear of interfering with the right of trial by jury, refuse my advice when asked by the accused—when that advice upon the law can be given without touching the facts? A stronger case to prove the propriety of saying what the law is, cannot be given, than the one mentioned in the argument. A crime is charged to have been committed in Fleming—the trial by change of *venue*, takes place in Harrison—and by mistake, the proof is not introduced that the crime was committed in Fleming. The judge, after spending weeks, felt himself bound to grant a new trial. Without venturing any opinion as to its correctness, I will say this—that if by mistake the grand jury should indict for a crime committed in Mason, and it should turn out, upon running the line accurately, that it was in another county, the jury would be bound to find the accused not guilty. Yet before the *law* could probably be understood by some juries, with as much common sense as the judge, though not raised lawyers, a cart load of books might be read, and time spent to investigate a point, that every judge could decide in a moment. And so of many other legal principles, which a man of constant reading, practice, and experience, can decide and advise the jury upon, without meddling with facts and consuming time. Indeed it seems almost indispensible in the administration of justice, criminal as well as civil, saying, as I do in this case, "If you find the *act* was not committed in Mason county, the *law* does not embrace the case."

This jury know that I am a slaveholder. The greatest part of my property consists of slaves, and a part of it now running at large in Ohio, or aided by that people to get into Canada. Yet shall I not lose sight of myself, my own interest, in deciding a great principle? "I do not love Cæsar less, but I love Rome more." Gentlemen of the bar know that I am aware of the difference between the courts possessing common law jurisdiction, and the courts established by Congress, which have not such jurisdiction. Can it be necessary for me to say more on that subject? I have never referred to the decisions of that court for any other purpose than to prove that the accused had a right to be tried *at the place* where he is charged to have committed the crime; and that the principle was held so sacred, that even where Virginia constituted the place or district, Congress in its wisdom to sustain the principle, had ordered that twelve men should be summoned from the county in which the crime was charged, and twelve were summoned from Wood county.

We have heard much of the fame of men as jurists, from the time of our great grandfather Coke to the present day. Allow me to say that the late Chief Justice Marshall was second to none of them. Hear what he said in concluding his opinion in the case so frequently referred to at this bar—for his *power* to tell

the law to the jury was also questioned:—"That this court dare not usurp power is most true. That this court does not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case; if there be no alternative presented to him, but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace. That gentlemen, in a case the most interesting, in the zeal with which they advocate particular opinions, and under the conviction, in some measure produced by that zeal, should on each side, press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is perhaps, a frailty incident to human nature; but if any conduct on the part of the court could warrant a sentiment that it would deviate to the one side or the other, from the line presented by duty and by law, that conduct would be viewed by the judge with an eye of extreme severity, and would long be recollected with deep and serious regret."

The result of the whole of my examination and deliberation, is a conviction, as complete as the mind of the court is capable of receiving on a complex subject, that the motion must prevail to the extent I have stated. I cannot, perhaps rightfully exclude the whole testimony; but the balance of the motion reduced to writing, as commented upon in this opinion, contains the law—that is to say, in the absence of all evidence to prove that the offence charged was committed by the prisoner being personally present in the county of Mason, *or near enough to receive information personally, and give aid and assistance in case of alarm or danger at the time the offence was commited,* he is not legally subject to this prosecution; and that this court and jury have no jurisdiction of his case, if from the evidence they are satisfied the prisoner is a citizen of the state of Ohio, and had not been in the state of Kentucky until brought here by legal process to answer this prosecution, subject to the same modification of the one as given in words italicized above.

The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, if they choose, and will find a verdict of *guilty* or *not guilty*, as their own consciences may direct.

Monday Evening, The attorney for the Commonwealth asked the Court to give to the jury the five following instructions, to wit:

1. That all who are guilty of the offence, created by this statute, are principals. By the terms of the statute, there can be no accessary before the fact.

2. That if there can be accessaries before the fact, under the statute enacting this offence, then if the jury should find from the evidence, that the prisoner at the bar was accessary before the fact, and that there was no punishment for the offence, if accessary, at the place and in the jurisdiction where the prisoner became accessary, before the fact; then by the operation of law the jurisdiction at-

taches to this court, where the offence was committed, and the prisoner may be tried in the county where the offence was committed.

3. That if the jury believe that the prisoner at the bar, he being in the State of Ohio, by his agents and confidents, in the county of Mason, in the State of Kentucky, did aid and assist the slave named in the indictment to escape from his master's service, into the State of Ohio, then the prisoner is guilty of the crime charged in the indictment.

4. That if the jury believe from the evidence, that the prisoner at the bar, he, the prisoner, being in the State of Ohio, did, by his confederates, in Mason county, in Kentucky, aid and assist the slave charged in the indictment, to escape from his master's service to the State of Ohio; and that he, the prisoner at the bar, was near enough to receive personal information, and give aid and assistance in case of alarm and danger—then the prisoner is guilty of aiding and assisting said slave to escape, and can be tried in Mason county.

5. That the jurors are the triers of the law, and the fact, in criminal cases, and have the right to determine both the law and the fact; and although the court has a right to instruct the jury upon the law, it has not the right to control the jury in their verdict.

Whereupon the Court delivered the following opinion, overruling the instructions, to wit:

The first, second, third, fourth and fifth motions of the attorney prosecuting, being read and handed to the prisoner's counsel, that he might determine whether he desired an argument or not, the prosecuting attorney believing he was able to support them;

The Judge said he did not desire any further argument, and if they chose to hand them to him he would decide without. And being handed, he said that all the matter contained therein was argued and duly considered before he rendered the written opinion which he gave to the prosecuting attorney this morning, and was as fully decided upon in that opinion as the judge deemed it proper for him to decide. And consequenrly, the 1st, 2nd, 3rd, 4th and 5th motions as reduced to writing are now overruled.

The cause being submitted to the jury without argument, one of the jurors requested that the witness Perrigo should again be called, as the jury did not unanimously agree as to some of his testimony; whereupon Perrigo was called, and being interrogated by the Court, the jury retired to their room, and in a few minutes returned with a verdict of "NOT GUILTY."

And the Court enquired of the attorney for the Commonwealth if we would proceed with the other indictment? He answered, *that* being of a similar nature, he would enter a *nolle prosequi*. And thereupon the prisoner was discharged.

APPENDIX.

LETTER OF MR. MAHAN.

SARDINIA, *Brown County, Ohio, Nov. 29, 1838.*

DEAR BROTHER SUNDERLAND:—After an absence of nearly ten weeks from my "home and my country," I returned and joined the society of my family and friends on the 24th inst.

Perhaps it may afford you some gratification to learn the particulars connected with this very extraordinary transaction. Of the two slaves for the abduction of whom I was indicted in the Mason Circuit Court, one, (Nelson,) I never saw, nor did I know there was such a human being in existence till I heard some time after that he had passed through Wilmington, a town forty miles north from my residence, and in the Canada direction. I have since ascertained that he was never within four miles of my residence. The other slave, (John,) called at my tavern* in Sardinia, on the morning of the 21st day of June last, and continued publicly, (not secreted or concealed,) in town through the day. He was at various stores and shops, and also at a temperance meeting in the evening, (same day.) He left for Canada without my aid, assistance or guidance. Until he came I had not known that there was such a man, or that William Greathouse was numbered amongst mortals. I had no agency of any possible sort in the escape of said slaves, or any other slaves, at any time before or since, nor had I any correspondence with any manner of person or persons, orally, or by letter, or agent, or otherwise, for the purpose of employing any agent to abduct slaves from Ky.; neither had I been in Mason county, nor any of the adjoining counties of Ky. for nearly twenty years. During that period I had not sent any letter or newspaper of any description to any person or persons, transiently or permnaently resident in Ky., or any other slave-state; nor had I ever any agent in Ky. on any business whatever. Indeed, sir, there would have been as much propriety in indicting me for the escape of the Israelites out of Egypt, the burning of London, the gunpowder plot, the conspiracy of Burr, or any violation of the law ever committed, as for aiding and assisting the slaves of Greathouse to "escape out of and beyond the State of Ky;" all that indigested batch of stories detailed by James Rock Perrigo to the contrary notwithstanding. Still I was indicted, and, in fraud of the constitution of our country and laws of the land, I was carried to a foreign jurisdiction, beyond the reach of my friends, imprisoned, fettered with irons, put on my trial, not before twelve of my peers in the vicinage of the supposed offence, but before twelve strangers in a strange country, men whom I knew not, of whom I had not heard, with whom I had never been associated, in whose vicinage I had never been; three additional lawyers being procured to assist the prosecuting attorney, hired by the people with money raised by donations and subscriptions,—a thing unheard of by the oldest lawyers in the

* Mr. Mahan keeps a tavern in Sardinia on the total abstinence principle.—
ED. PHIL.

western country. And then, forsooth, because in the absence of all proof of guilt, I was acquitted and escaped with life and limbs, a certain Kentucky editor gives it out in broad terms, that the people of Ohio will perceive, that "there is no disposition on the part of Kentucky to interfere with their rights or encroach on the sovereignty of their State!" Indeed, sir, I cannot but regard this as adding insult to injury. It appears to me, that the people of Ohio can perceive no such thing.

It ought not to be concealed that Judge Reid, to his everlasting honor be it said, with all the coolness of a philosopher and the prudence of a christian, administered the law as "it is," and that the highest functionaries of Ky. looked with burning indignation on the corruption, fraud and perjury, by which the most flagrant aggressions were made on the rights of a citizen of Ohio.

The trial lasted six days; the greater part of which was taken up in arguing the question of jurisdiction. During the whole course of the trial, no attempt was made, either by direct proof, or argument, or inference, to show that I had ever been in Ky. at any time; but, on the contrary, it was admitted, on the part of the prosecution, that I never had been in Ky. Indeed, one of the counsel, on the part of the prosecution, did admit that I had not been at any time within five hundred miles of the extreme border of Ky., and from this point he commenced a train of ingenious sophisms, to prove that I *might be*, (not that I was,) guilty.

I ought not to omit stating, that I received acts of hospitality and kindness from Kentuckians which cannot be forgotten, notwithstanding the mass of the people, in a very extraordinary manner, encouraged the prosecution, by raising the hue and cry of "*mad dog*," by which my defence cost me ten times more than it otherwise might have done. Who is responsible for this? Responsibility rests some where. How will the people dispose of their responsibility? Will they divide it among themselves? Will they charge it on the grand jury that indicted me, or the prosecuting attorney that advised the *finding*; or will they charge it on the individual, whose sin it was in "fraud of the law," to have me taken into the jurisdiction of his State, that he might with impunity commence a civil suit against me for damages, because his slaves used the legs which nature gave them? Kentuckians have it in their power to do a noble deed by setting this matter right. Will they do it? Kentuckians have a right to investigate this whole affair, and settle the question of responsibility amongst themselves, as their court has the question of jurisdiction. It is proper, the people expect it, truth and justice require, that I should make an exhibition of the truth with regard to things attempted to be proved against me. On the trial it was said by Mr. Rock, *alias* Perrigo, *alias* Rock Perrigo, that at my residence I told him there was a chain running across Ohio, by which slaves were forwarded to Canada. I never heard of such chain till it was spoken of on my trial. I am no link of such chain, and, although I am extensively acquainted with the sentiments and operations of *abolitionists*, I do not believe there is or ever was such chain in Ohio. This same witness also stated, that I told him a "colored barber in Maysville sent me all he could." But I did not tell him a "colored barber" *did* send me any or "*could*" send me any. That was the first time, according to my recollection, that I ever heard whether there was any such being as a Maysville barber. I never was in

Maysville till before my trial. I never held any correspondence with any person, either directly or indirectly in Maysville.

I never had any acquaintance with any persons or persons resident in Maysville, till after my abduction, except the Rev. John Collins and Richard Collins, Esq., and that acquaintance was formed in Ohio previous to their residence in Kentucky. This same James Rock Perrigo, under his oath on the trial stated, that I told him fifteen slaves had passed through my hands during the preceding month. Now, since the days of abolitionism, I am confident, (so far as I have any means of knowing) not more than four fugitive slaves have passed through the place of my residence, (Sardinia) and in all I have never seen more than seven or eight persons whom I suspected to be *runaways*.

However much every good man desires slavery should have an end, and however much abolitionists are willing to hazard and sacrifice for this oppressed, degraded and despised portion of our fellow-men, I am confident that few, if any, for various reasons, would invade the jurisdiction of another state, to give aid or encouragement to slaves to escape from their owners. But it ought not to be concealed, that a very great majority of northern people, as well those that *are not* as those that *are* abolitionists, (however much human nature has been marred by sin) are not capable of violating the sympathies of their nature or the dictates of their common humanity, so far as to be able to drive from their doors the unsheltered, unprotected stranger, or send away unfed, unclothed, unprovided for, the outcasts or wandering poor.

On the second day of my imprisonment, Mr. Greathouse commenced a suit against me at common law, for damages $1700, and in a few days he sent in terms of compromise, offering to send the witness, James Perrigo, out of the way, (as he was not recognized,) that he might not appear against me at court; and also, that I should be acquitted and delivered safely on my own side of the river, on condition that I would have deposited with his friend in Ohio, $1400, to be paid to him when I arrived safely at home. I declined such compromise, and afterwards he sent a proposition that he would take $1200! This, however, I refused, and consequently was put on my trial,—The civil suit is still pending. Mr. Greathouse, after I was acquitted from the criminal prosecution, proposed by my friend, to take $800. The suit will be tried in May next.

Thus I have given you a brief sketch of the case from first to last, and you can make such disposition of it as you think proper.

Yours, very sincerely, JOHN B. MAHAN.

Rev. L. Sunderland.

☞Owing to the haste in which this pamphlet is issued, it is disfigured by many typographical errors. Mr. Vaughan's speech, particularly, has suffered greatly. We should be ashamed to notice all the errors by which it is marred; but they are for the most part such as affect the style, rather than the substance.

☞We have thought proper to publish only four of the speeches delivered by counsel. These, it is thought, cover the whole ground on which the case was argued. The three other speeches are accordingly omitted, not from any disrespect to the gentlemen who delivered them, or an undervaluation of their merits; but because it was deemed expedient to compress the pamphlet within as small a space as should consist with a faithful report of everything of essential importance connected with the trial.

MAY 4 - 1964